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Host-Nation Regulation and Incentives for Private Foreign Investment: A Comparative Analysis and Commentary†

Ndiva Kofele-Kale*

I. Introduction

With few exceptions, African states since the early 1960s¹ have attempted to create an environment conducive for private foreign direct investment (FDI).² Since then a flurry of investment legislation has been enacted³ in hopes of attracting private foreign invest-

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¹ See, e.g., U.N. STANDING COMMITTEE ON INDUSTRY AND NATURAL RESOURCES, INVESTMENT LAWS AND REGULATIONS IN AFRICA, U.N. Doc. E/CN.14/INR/28/Rev.2, U.N. Sales No. 65.II.k.3 (1965). For more recent investment codes, see U.S. DEP'T OF COMMERCE, INTERNATIONAL TRADE ADMINISTRATION, 2 INVESTMENT CLIMATE IN FOREIGN COUNTRIES: AFRICA (1985) [hereinafter INVESTMENT CLIMATE].

² The International Monetary Fund (IMF) defines foreign direct investment as investment made (usually by private firms, many of which are multinational corporations) to acquire a lasting interest in a foreign enterprise with the purpose of having an effective voice in its management. This definition also includes indirect capital contributions, such as net loans from companies to their subsidiaries and also reinvested profits. IMF, FOREIGN PRIVATE INVESTMENT IN DEVELOPING COUNTRIES 1 (1985) [hereinafter FOREIGN PRIVATE INVESTMENT]. The IMF definition does not, however, provide any guidelines as to the percentage of foreign ownership that qualifies an investment as foreign. Flexibility seems to be the guiding principle on this question. Some countries use ten percent foreign ownership as the benchmark while others more. See Cable & Persaud, *New Trends and Policy in Foreign Investment: The Experience of Commonwealth Developing Countries*, in DEVELOPING WITH FOREIGN INVESTMENT 1, 18 (V. Cable & B. Persaud eds. 1987).

³ A survey of African investment legislation since the 1960s reveals three distinct waves or generations. The first generation of investment laws came into existence during the 1960s and early 1970s. The prevailing mood during this period favored restrictive policies to regulate the entry, activities, and operations of foreign investors. In the second generation or wave of investment regimes passed in the late 1970s and early 1980s, liberalization of foreign investment policies was the dominant trend. The third generation of investment laws came about after 1984 in response to the structural adjustment and stabilization programs of the World Bank and the IMF. Many governments eased the restrictions on foreign direct investment even further by simplifying and streamlining cumbersome and complex screening procedures and easing bureaucratic delays.

ment.⁴ The belief then⁵ and now⁶ is that such investment will spur economic growth and development since it brings with it new scarce resources—capital, technology, management, and marketing skills—otherwise absent in the host nations.⁷ The extent to which these investment laws and regulations have had any measurable impact on the amount of FDI flowing into the host countries is debatable,⁸ but a growing body of empirical evidence strongly suggests that prospective foreign investors see investment laws as an important barometer for gauging the investment climate in a given country.⁹ It is there-

⁴ For an excellent survey of the objectives of the first generation of African investment regimes, see Dixon-Fyle, *Economic Inducements to Private Foreign Investment in Africa*, 4 J. DEV. STUD. 109 (1967).

⁵ This position was strongly endorsed by the United Nations General Assembly when it recommended, in 1954, "continuing efforts by both capital-exporting and capital-importing countries . . . to stimulate the flow of private capital to the underdeveloped countries." This resolution came out of the recognition that the "international flow of private investment for productive activities contributes to the raising of living standards by assisting in the development of natural resources, the expansion and diversification of agricultural production and the growth of technical skills." G.A. Res. 824, 9 U.N. GAOR Supp. (No. 21) at 12, U.N. Doc. A/2890 (1954). A few years later the United Nations General Assembly reaffirmed its belief that private foreign investment was critical to third world development when it designated the 1960s as the United Nations Development Decade and issued a plea to member-states to "pursue policies which will lead to an increase in the flow of development resources, [both] public and private, to developing countries on mutually acceptable terms." G.A. Res. 1710, 16 U.N. GAOR Supp. (No. 17) at 17, U.N. Doc. A/5100 (1961).

⁶ In his 1989 New Year address, President Biya of Cameroon reiterated his government's commitment to enlist the help of foreign investors in the economic development of the country: "In order to increase our sphere of activity, we must continue to inspire confidence in foreign investors. To achieve this end, we have precious assets. . . . We need a more attractive investments code; we are working at it." *Better Days Are Ahead For Us*, Cameroon Tribune, Jan. 2, 1990, at 2, col. 3 [hereinafter New Year Address].

⁷ See FOREIGN PRIVATE INVESTMENT, *supra* note 2. But, for a spirited debate on the advantages and disadvantages of foreign direct investments, see C. BERSTEN, T. HORST & T. MORAN, AMERICAN MULTATIONALS AND AMERICAN INTERESTS 354, 368-69 (1978); Moran, *The Future of Foreign Direct Investment in the Third World*, in INVESTING IN DEVELOPMENT: NEW ROLES FOR PRIVATE CAPITAL? 3 (T. Moran ed. 1986); Grieco, *Foreign Investment and Development: Theories and Evidence*, in INVESTING IN DEVELOPMENT: NEW ROLES FOR PRIVATE CAPITAL? 35 (T. Moran ed. 1986).

⁸ Indeed this is the focus of a forthcoming commentary. Kofele-Kale, *The Political Economy of Foreign Direct Investment: A Framework for Analyzing Investment Laws and Regulations in Developing Countries* (forthcoming). See also Huang, *The State and Foreign Investment: The Cases of Taiwan and Singapore*, 22 COMP. POL. STUD. 93 (1989); S. GUISINGER, INVESTMENT INCENTIVES AND PERFORMANCE REQUIREMENTS: PATTERNS OF INTERNATIONAL TRADE, PRODUCTION, AND INVESTMENT (1985); Lessard & Hansen, *Host-Government Regulations and Incentives for Foreign Direct Investment*, in 1 NEGOTIATING FOREIGN INVESTMENTS: A MANUAL FOR THE THIRD WORLD § 3.1B, at 1 (R. Hellawell & D. Wallace, Jr. eds. 1982); J.-M. GANKOU, L'INVESTISSEMENT DANS LES PAYS EN DÉVELOPPEMENT: LE CAS DU CAMEROUN (1985). But see W. NDONGKO, ECONOMIC MANAGEMENT IN CAMEROON: POLICIES AND PERSPECTIVES (1985). Ndongko's review of foreign investments following the enactment of Cameroon's first investment code in 1960 found that in the first years of its operation, 38 firms with capital investments of about 10.4 billion francs CFA (African Financial Community) were granted incentives under the code. These firms were responsible for the creation of 8,000 jobs in the country. By 1969, 133 foreign firms had invested approximately 38 billion francs CFA accounting for 32,757 jobs. *Id.* at 171 *passim*.

⁹ For a sample of this recent empirical scholarship, see, e.g., S. GUISINGER, *supra*

fore not surprising that lawyers who counsel private foreign enterprises conclude that investment laws and policy influence in varying degrees their client's decision to invest in a particular country. Recognition of the importance of investment codes has led to a spate of law review analyses of this ever-changing phalanx of laws¹⁰ as well as the publication of primers on the legal "dos" and "don'ts" of doing business in one developing country or another.¹¹

This Article gathers under one umbrella several investment laws and regulations and subjects them to a rigorous comparative examination.

A. *The Units of Analysis*

The investment regimes of Cameroon, Côte d'Ivoire, Kenya, and Zaire (the "Four Darlings") are the subject of this comparative treatment because these nations share a number of characteristics that many foreign investors consider important in deciding where to invest. Of their many similarities, all four governments repeatedly profess a commitment to a market-oriented economic philosophy and, in recent years, have actively courted foreign investors.¹² Second, in response to prodding from the World Bank and the International Monetary Fund (IMF), the political leadership in these countries has been willing to denationalize previously state-owned enterprises.¹³ Third, all four countries have good-size domestic

note 8; Riedel, *Attitudes in the Federal Republic of Germany to the Policies of Developing Countries Regarding Foreign Investors*, 13 *INDUSTRY & DEV.* 1 (1984).

¹⁰ E.g., Gittleman, *The Establishment and Operation of a Business Enterprise in the Republic of Zaire*, 3 *INTERNATIONAL CENTER FOR SETTLEMENT OF INVESTMENT DISPUTES REVIEW—FOREIGN INVESTMENT LAW JOURNAL (ICSID REV.—FILJ)* 263 (1988); Mitchell & Gittleman, *The 1986 Zairian Investment Code: Analysis and Commentary*, 2 *ICSID REV.—FILJ* 122 (1987); Sams, *The Legal Aspects of Doing Business in Cameroon*, 17 *INT'L LAW* 489 (1983).

¹¹ E.g., TOUCHE ROSS, *BUSINESS INVESTMENT AND TAXATION HANDBOOK* (1989); W. DIAMOND & D. DIAMOND, *CAPITAL FORMATION AND INVESTMENT INCENTIVES AROUND THE WORLD*, (1989); COOPERS & LYBRAND, *1990 INTERNATIONAL TAX SUMMARIES: A GUIDE FOR PLANNING AND DECISIONS* (E. Kostin ed. 1990); T. BREWER, K. DAVID, L. LIM, & R. CORREDERA, *INVESTING IN DEVELOPING COUNTRIES: A GUIDE FOR EXECUTIVES* (1986) [hereinafter T. BREWER]; *NEGOTIATING FOREIGN INVESTMENTS: A MANUAL FOR THE THIRD WORLD* (R. Hellawell & D. Wallace, Jr. eds. 1982); *PRAC. L. INST., LEGAL ASPECTS OF DOING BUSINESS IN BLACK AFRICA* (1981).

¹² Zaire and Cameroon have recently revised their investment codes and expanded on the benefits available under the old codes. They also maintain a wide range of bilateral investment agreements with many West European countries. Zaire, for instance, maintains such agreements with France, Belgium, Switzerland, West Germany, Italy, Canada, Denmark, and the Netherlands, and has been negotiating one with the United States. *INVESTMENT CLIMATE*, *supra* note 1, at 365. Cameroon signed an investment treaty with the United States in 1984. *Bilateral Investment Treaty*, Aug. 3, 1984, United States-Cameroon, *reprinted in* *ICSID, 3 INVESTMENT LAWS OF THE WORLD: TREATIES at 1984-1* (1985). It has also entered into treaty arrangements with Belgium, Canada, France, Great Britain, West Germany, Romania, and Switzerland. *INVESTMENT CLIMATE*, *supra* note 1, at 57.

¹³ All four have in the last seven years entered into structural adjustment programs with the World Bank and/or stabilization programs with the IMF requiring privatizing a substantial number of state-controlled enterprises. See *INVESTMENT CLIMATE*, *supra* note 1,

markets,¹⁴ well-educated labor forces at the primary level (less so at the secondary and tertiary levels), and favorable conditions for a take-off of export manufacturing and import-substitution industries. Finally, relative to other African states, all four countries have a record of political stability over the past twenty-five years.¹⁵ This stability can be most reassuring to a foreign investor since investment decisions are influenced by the investor's perception of the political stability of a given country.¹⁶

In sum, the economic achievements and relative political stability of these four countries have earned them both effusive praise and an unrelenting barrage of criticism. On one hand, their economies are touted by the international financial community as models for other developing African countries.¹⁷ The academic community,

at 167, 177, 360 *passim*. Since 1976, Zaire has had six stabilization plans (in 1976, 1977, 1979, 1981, 1983, and 1985). Callaghy, *Absolutism, Bonapartism, and the Formation of Ruling Classes: Zaire in Comparative Perspective*, in *STUDIES IN POWER AND CLASS IN AFRICA* 95, 109 (I. Makovitz ed. 1987) [hereinafter Callaghy, *Zaire in Comparative Perspective*].

¹⁴ As of 1986 (official mid-year estimates), the population of the Four Darlings was: Cameroon, 10.5 million; Côte d'Ivoire, 9.7 million; Kenya, 21.2 million; Zaire, 31.5 million. 1990 *EUROPA WORLD Y.B.* 609, 785, 1523, 2994.

¹⁵ All are one-party states. Cameroon's ruling and only party is the Cameroon Peoples Democratic Movement, formed in 1985 as a successor to the Cameroon National Union which came into existence in 1966. The Parti Démocratique de la Côte d'Ivoire has been the ruling party in Côte d'Ivoire since 1959. Kenya has been under the spell of the Kenyan African National Union for close to two decades. The Mouvement Populaire pour la Révolution has held sway in Zaire since 1963. Leadership continuity and longevity are hallmarks of these four countries: Cameroon has had two presidents since independence, Ahmadou Ahidjo (1960-1982) who was then succeeded by his *dauphin* Paul Biya (1982-); Kenya has also had two strongmen, Jomo Kenyatta (1964-1978) and Arap Moi (1978-); and Côte d'Ivoire and Zaire have each had only one president since independence, Houphouët-Boigny for the former and Mobutu Sese Seko in the latter. Here is how one astute student of Zairian politics describes the system in place: "Zaire is an authoritarian state organized around a presidential monarch, Mobutu Sese Seko, who adopted the Belgian colonial state structure and patrimonialized it by creating an administrative monarchy." Callaghy, *The International Community and Zaire's Debt Crisis*, in *THE CRISIS IN ZAIRE: MYTHS AND REALITIES* 221 (Nzongola-Ntalaja ed. 1986) [hereinafter Callaghy, *Zaire's Debt Crisis*].

¹⁶ For a discussion of this view, see, e.g., L. THUNNELL, *POLITICAL RISKS IN INTERNATIONAL BUSINESS: INVESTMENT BEHAVIOR OF MULTINATIONAL CORPORATIONS* (1977); Bennett & Green, *Political Instability as a Determinant of Direct Foreign Marketing Investment*, 9 *J. MKTG. RES.* 182 (1972); Y. AHARONI, *THE FOREIGN INVESTMENT DECISION PROCESS* (1966).

¹⁷ For instance, two of these countries, Cameroon and Côte d'Ivoire, have for a long time been treated as the *enfants chéris* of international financiers. A 1985 U.S. Commerce Department publication, as an example, describes Cameroon as follows:

While it may have been the smell of oil which ultimately propelled Cameroon to near the top of the list of African countries of interest to the international business community, this Central African nation's political stability, close ties to the West, relatively balanced market-oriented economy, and excellent development track record were also strong contributing factors. Some newfound interest in Cameroon may well be relative, coming in the wake of recent difficulties in previous LDC "superstars" and given that Cameroon is only one of two West African countries to register cumulative gross domestic product (GDP) growth over the past three years, according to the World Bank. But Cameroon has deserved attention on its own merits as well, given its consistent economic performance since independence 24 years ago.

however, dismisses them as a sad collection of neo-colonial states,

INVESTMENT CLIMATE, *supra* note 1, at 51.

For an assessment of Côte d'Ivoire, what better place to go but to a reference manual on the climate for investment in 104 countries, relied on by international executives of multinational corporations as well as lawyers, accountants, bankers, and independent financiers:

With one of the highest per capita incomes of the world's developing countries, now exceeding \$1,300, the Ivory Coast . . . today is attracting trade and investment in increasing amounts. *Annual oil revenues of \$4 billion have made this small nation about the size of New Mexico also one of the most prosperous in the "Third World."* Newly discovered offshore oil settlements place the Ivory Coast's reserves at about 8 billion barrels, roughly the same as Algeria's proven resources. The self-sufficiency and well-being of the people have created a stable political atmosphere to make the present regime the envy of most of Africa. . . . In view of the economic and political unrest in neighboring African nations, many foreign businessmen have shifted their investing and marketing emphasis to the Ivory Coast. The political stability of this French-speaking nation, helped by the presence of some 8,000 French soldiers, is playing a key part in attracting American direct investment because of the shrinking number of African countries that can offer day-to-day business activities without disruptions from terrorism, guerilla warfare, labor unrest or famine. *The United States is now the Ivory Coast's second largest trading partner and America's private industry has invested \$1 billion in the country as against the \$1.2 billion of French investment, the leading suppliers of capital from abroad.*

W. DIAMOND & D. DIAMOND, *supra* note 11, at Ivory Coast-1 to -2 (emphasis added).

The 1985 Annual World Bank Report cited Kenya

as a most promising area for future investment and trade. The Annual Report commended the Kenyan Government for cutting its external debt while such other factors as the 5% expansion in gross national product, improvement in agricultural production, pro-Western attitudes and healthy reserves accumulated from more than 400,000 tourists annually offer American exporters and investors additional incentives to help develop the nation. . . . This relatively politically stable nation with its modern and enterprising commercial facilities and Western-oriented practices has urged members of the American Business Association in Nairobi to take advantage of Kenya's healthy investment climate by increasing their equity in Kenyan companies. . . . Foreign investors earned record profits and remitted handsome dividends to parent overseas corporations in 1985 despite the fact that returns have been adversely affected by certain government policies such as price control.

W. DIAMOND & D. DIAMOND, *supra* note 11, at K1-2.

The Zairian government's long and notorious history of economic mismanagement should have disqualified Zaire from membership in the pantheon of model African economies now reserved for Cameroon, Côte d'Ivoire, and Kenya. Zaire has, however, managed to seduce the international financial community to a point where it has been all too willing to bail out the Mobutu government during its all too frequent periods of gross financial mismanagement crises. Professor Callaghy notes with genuine astonishment the solicitedness of Western financiers to Zaire's fiscal problems:

Zaire's public and publicly insured debt has . . . been rescheduled by the Paris Club countries six times (in 1976, 1977, 1979, 1981, 1983, and 1985)—*a world record*. Zaire's private creditors rescheduled their part of the debt in April 1980 and again in May 1985, and nine World Bank and Western country aid consortia meetings have been held to generate larger official assistance (one in 1977, two in 1978, and one each in 1979, 1980, 1981, 1982, 1983, and 1985). The World Bank has supported these efforts directly via structural adjustment loans and technical assistance.

Callaghy, *Zaire in Comparative Perspective*, *supra* note 13, at 109 (emphasis added). See also Callaghy, *Zaire's Debt Crisis*, *supra* note 15; Leslie, *The World Bank and Zaire*, in *THE CRISIS IN ZAIRE: MYTHS AND REALITIES* 245 (Nzongola-Ntalaja ed. 1986). This rather servile attitude of international financial institutions is understandable when one considers that Zaire is the third largest country in Africa and it is endowed with vast natural resources not to

hardly the models that should inspire admiration and emulation by the rest of Africa, especially an Africa that must pursue a strategy of autonomous development.¹⁸ To critics, these liberal investment codes and the liberal economic policies which spawned them are the root cause of the persistent fiscal crises these countries periodically experience, and a sobering reminder of the consequences of their dependency on, and domination by, the West.

B. *On the Logic of Comparison*

Comparison as a method of inquiry is recognized as one of the basic research tools (the others being the experimental, statistical, and case study methods) available to the social scientist.¹⁹ While three of these methods search for scientific explanations, i.e., the establishment of general empirical propositions, the case study approach operates in a theoretical vacuum.²⁰ It is, as Professor Lipjhart observes, "neither guided by established or hypothesized generalizations nor motivated by a desire to formulate general hypotheses."²¹ The case study, with its focus on a single country and a

mention its enormous potential market for consumer goods. It clearly is a country that cannot be ignored for trade and investment purposes in world trade and investments.

¹⁸ For a sample, by no means representative, of critical commentaries on the economic policies of these states, see Kofele-Kale, *Cameroon and Its Foreign Relations*, 80 AFR. AFF. 197 (1981); Tunteng, *External Influence and Subimperialism in Francophone West Africa*, in THE POLITICAL ECONOMY OF CONTEMPORARY AFRICA 212 (P. Gutkind & I. Wallerstein eds. 1976); W. NDONGKO, PLANNING FOR ECONOMIC DEVELOPMENT IN A FEDERAL STATE: THE CASE OF CAMEROON 1960-1971 (1975); M. BETI, MAIN BASSE SUR LE CAMEROUN: AUTOPSIE D'UNE DÉCOLONISATION (1972) (a blistering if somewhat polemical attack on Cameroon's liberal economic policies during the Ahidjo years); S. AMIN, LE DÉVELOPPEMENT DU CAPITALISME EN CÔTE D'IVOIRE (1967); Campbell, *Neo-Colonialism, Economic Dependence and Political Change: A Case Study of Cotton and Textile Production in Ivory Coast 1960-1970*, 2 REV. AFR. POL. ECON. 36 (1975); Campbell, *The Fiscal Crisis of the State in the Ivory Coast*, in CONTRADICTIONS OF ACCUMULATION IN AFRICA 267 (B. Campbell & H. Bernstein eds. 1985); Mingst, *The Ivory Coast at the Semi-Periphery of the World-Economy*, 32 INT'L STUD. Q. 259 (1988); Ngongo, *Liberal Models of Capitalist Development in Africa: Ivory Coast*, 3 AFR. DEV. 5 (1978); Woods, *State Action and Class Interests in the Ivory Coast*, 31 AFR. STUD. REV. 93 (1988); A. YANSANE, DECOLONIZATION IN WEST AFRICAN STATES WITH FRENCH COLONIAL LEGACY: COMPARISON AND CONTRAST: DEVELOPMENTS IN GUINEA, THE IVORY COAST AND SENEGAL 1945-1980 (1984); Zartman & Delgado, *Introduction: Stability, Growth, and Challenge*, in THE POLITICAL ECONOMY OF IVORY COAST 1 (I. Zartman & C. Delgado eds. 1984); C. LEYS, UNDERDEVELOPMENT IN KENYA (1975); N. SWAINSON, THE DEVELOPMENT OF CORPORATE CAPITALISM IN KENYA 1918-77 (1980); ZAIRE: THE POLITICAL ECONOMY OF UNDERDEVELOPMENT (G. Gran ed. 1979); THE CRISIS IN ZAIRE: MYTHS AND REALITIES (Nzongola-Ntalaja ed. 1986).

¹⁹ See, e.g., Lipjhart, *The Comparable-Cases Strategy in Comparative Research*, in COMPARATIVE POLITICS IN THE POST-BEHAVIORAL ERA 54 (L. Cantori & A. Ziegler, Jr. eds. 1988); COMPARING PUBLIC POLICIES: NEW CONCEPTS AND METHODS (D. Ashford ed. 1978); L. MAYER, COMPARATIVE POLITICAL INQUIRY: A METHODOLOGICAL SURVEY (1972); Lipjhart, *Comparative Politics and the Comparative Method*, 65 AM. POL. SCI. REV. 682 (1971) [hereinafter Lipjhart, *Comparative Method*]; A. PRZEWORSKI & H. TEUNE, THE LOGIC OF COMPARATIVE SOCIAL INQUIRY (1970); Kalleberg, *The Logic of Comparison: A Methodological Note on the Comparative Study of Political Systems*, 19 WORLD POL. 69 (1966).

²⁰ See Lipjhart, *Comparative Method*, *supra* note 19, at 691.

²¹ *Id.*

single investment code, has been the preferred methodology on research on the environment for foreign private investment. This approach is rejected in this study in favor of the comparative method.

Without minimizing the many advantages of the case method,²² to the extent that systematic theory-building is one of the goals of such studies, its many flaws make it most unsuitable for studies on the climate for foreign direct investment. The focus on a single country's investment code often leads to the conclusion that that case study is unique and should be analyzed separately and differently from other investment codes. This hermitic vision increases the risk of the researcher committing the historicist fallacy²³ of seeing the single experience as special or unique. The examination of several investment codes, however, invariably increases our knowledge about the way these codes differ among themselves.

A second problem with the one-country, one-investment code approach is that it carries the inherent danger that conclusions based upon this single case study will be extended to a wider cross-national scene. An examination of Côte d'Ivoire's investment code, for example, might lead to the conclusion that, since the country is a former French colony and has a liberal investment code, perhaps all former French African colonies will have comparable codes. A comparative approach to the study of investment codes guards against such culture-bound observations and generalizations, especially if the focus of the analysis is on comparable cases, i.e., cases that are similar in a large number of important characteristics.²⁴ This is precisely the aim of this study: by holding as constant a number of significant variables common to the Four Darlings, such as political stability, economic orientation, sound economies, reasonably proper management, and so on, the inherent differences in the various investment codes will be revealed.

The comparative study also provides an additional dimension to compare and evaluate countries that are putatively similar in some important characteristics. The Four Darlings are frequently portrayed as neo-colonial dependent states. Comparisons with other African states made in terms of political stability, leadership, policy

²² The great advantage of the case study approach to the study of investment climates is that it allows for the intensive, in depth examination of a single country, a single investment code. But having said this, it bears repeating that "science is a generalizing activity. A single case can constitute neither the basis for valid generalization nor the ground for disproving an established generalization." Lipjhart, *Comparative Method*, *supra* note 19, at 691.

²³ For a discussion of historicism and related epistemological issues in the context of scientific inquiry, see READINGS IN THE PHILOSOPHY OF THE SOCIAL SCIENCES (M. Brodbeck ed. 1968); MEANING AND KNOWLEDGE, SYSTEMATIC READINGS IN EPISTEMOLOGY (E. Nagel & R. Brandt eds. 1965); K. POPPER, THE LOGIC OF SCIENTIFIC DISCOVERY (1959); READINGS IN THE PHILOSOPHY OF SCIENCE (M. Brodbeck & H. Feigl eds. 1953).

²⁴ See Lipjhart, *Comparative Method*, *supra* note 19, at 687.

continuity, and friendliness towards the West, invariably lead to the conclusion that the investment climates of the Four Darlings are more hospitable to foreign investors than other African countries. A comparative examination of the investment climates in the Four Darlings provides, however, a more complete and accurate basis for comparing these countries, which might lead to an alteration of previous evaluations of the attractiveness of the environment for investment in these countries relative to the other African countries.

If the goal of comparing investment codes is the establishment of generalizations about the climate for foreign private investments for as wide a range of countries as possible, then this Article is a modest step in that direction. Studies such as this can have practical policy implications as well, illustrated by some discernible trends and projections on the flow of foreign direct investments to the developing countries in general, and Africa in particular. Historically, Africa's share of aggregate foreign direct investment (FDI) flows to developing countries has been small. The average annual inflow of FDI to Africa (excluding South Africa) for 1981-82 and 1983-84 was \$1.6 billion and \$1.4 billion respectively. During the same periods, Asia received \$4.1 billion and \$4.2 billion of FDI respectively.²⁵ Africa's relatively small share of FDI is in danger of disappearing altogether should FDI flows be redirected to the newer and more attractive investment opportunities that the nascent market economies of Eastern Europe provide, as many experts now predict.²⁶

While Africa relies on FDI to finance economic growth and development, this reliance comes at a time of dramatic decline of the share of FDI in the aggregate flow of external resources from the industrialized countries to the developing countries. Between 1967-73 the percentage of FDI flows to developing countries was twenty-four percent. It dropped to sixteen percent in 1974-80, and has continued to decline.²⁷ In constant (1983) prices and exchange rates,

²⁵ Goldsbrough, *Investment Trends and Prospects: The Link with Bank Lending*, in *INVESTING IN DEVELOPMENT: NEW ROLES FOR PRIVATE CAPITAL?* 173, 176 (T. Moran ed. 1986).

²⁶ Cameroon's President Biya was among the first of many African statesmen to voice this fear:

I would like to emphasize one important event which marked 1989 and to which Cameroon cannot remain indifferent. I am referring to the developments in Eastern Europe. The democratization process taking place there augurs for hope and progress. In strictly economic terms, for us Cameroonians, two aspects should be considered: *We may fear the economic repercussions of such an event, for the aid granted to African countries may be reduced to the advantage of those of Eastern Europe.*

New Year Address, *supra* note 6, at 2 (emphasis added). See also *Africans Fear Abandonment as Attention Turns to Eastern Europe*, *AFR. REP.*, Nov.-Dec. 1989, at 8.

²⁷ See Cable & Persaud, *supra* note 2, at 2. But see C. OMAN, *NEW FORMS OF INTERNATIONAL INVESTMENT IN DEVELOPING COUNTRIES* (1984) (arguing that FDI statistics may be becoming increasingly irrelevant as new forms of international investment are devised, including joint ventures, licensing agreements, production-sharing contracts, and international subcontracting).

the average annual flow of FDI to developing countries rose from \$7.8 billion in 1970-74 to \$13.7 billion between 1975-79, but then fell sharply to \$11.1 billion in 1980-84.²⁸

Despite a shrinking pool of resources, a World Bank report notes that FDI still has a positive role to play in closing the gap between high and low income growth countries.²⁹ The difference between these two groups of countries, according to this report, is "mirrored in, respectively, a \$9 billion and \$64 billion deterioration in the current-account balance from 1985 to 1995."³⁰ Closing this gap will require

increasing from \$11 billion in 1985 to \$19.1 billion in 1995 (in 1985 prices) in the high growth and to \$14.2 billion in the low growth scenario, these representing an annual real growth of respectively 5.7% and 2.6%. *The difference between the 'high' and 'low' figures partly reflects the response of foreign investors to higher or lower growth in developing countries, and partly the policy orientation of host countries.*³¹

The conclusions are inescapable. First, competition for this declining pool of FDI will be fierce. Second, only those African countries that enjoy an informational advantage over their neighbors stand any chance of surviving this competition. Third, to acquire this needed informational advantage, countries with foresight will need to know a lot more about their major competitors. In the end, a host country's ability to attract new inflows of FDI, or even to maintain present levels of FDI stock, will depend on its success in making its environment much more attractive and hospitable for FDI than its neighbors' environments. This task will be greatly furthered if the policy-makers responsible for the drafting and implementation of investment codes have intimate knowledge of the mix of incentives being offered to foreign investors by their major competitors, especially if these competitors have been successful in attracting a steady flow of FDI. Finally, these developments may also present foreign investors with a veritable *embarras du choix* to the extent that they have to choose from a pool of increasingly attractive investment options. Comparative studies that bring together under one roof a range of investment "climates" provide the foreign investor ready access to valuable information for quick reference. Having before the foreign investor and the policy-maker well-executed comparative studies of competing investment regimes makes their search and verification functions relatively painless and cost-free. Thus, resources spent collecting and evaluating numerous investment regimes can be put to other uses.

²⁸ Cable & Persaud, *supra* note 2, at 18.

²⁹ *See id.* at 5-6.

³⁰ *Id.*

³¹ *Id.* at 6 (emphasis added).

II. Contrasts and Similarities in Investment Codes

The investment codes and related legislation will be analyzed along the following dimensions:

- (1) the authority responsible for supervising investments,
- (2) conditions of entry and the sectors open to FDI,
- (3) the monitoring and supervising of foreign businesses,
- (4) ownership regulations,
- (5) remittability of funds,
- (6) performance requirements,
- (7) tax provisions affecting investments, and
- (8) rules of compensation on nationalization.

A. Patterns of Administrative Control

Government organization regarding foreign investment is a critical determinant in a country's effectiveness in attracting and controlling foreign investment.³² As Guisinger noted in his comparative study of investment policies:

The importance of organization to competitive strategy arises from the costs incurred by prospective foreign investors in securing government approvals. Many branches of government—departments of finance, labor, and commerce—and public-sector corporations see their interests affected by foreign investments and insist on a role in formulating foreign investment policies and in negotiating individual entry agreements when their agency's interests are at stake. *But government attempts to involve each branch in the entry process can discourage foreign investors.*³³

The Four Darlings all centralize the authority for formulating investment policy in ministries that are seen as the nucleus of economic control. In Cameroon, that authority is exercised in the Ministry of Industry;³⁴ for Côte d'Ivoire it is the Ministry of Industry;³⁵ in Kenya, the responsible authority is the Ministry of Finance;³⁶ in Zaire, that responsibility is shared jointly by the Commissioners of Finance and Planning.³⁷ By placing foreign investment policy-mak-

³² Guisinger, *A Comparative Study of Country Policies*, in INVESTMENT INCENTIVES AND PERFORMANCE REQUIREMENTS 1, 30-31 (S. Guisinger et al. eds. 1985) [hereinafter Guisinger, *Comparative Country Policies*].

³³ *Id.* at 31 (emphasis added).

³⁴ Law No. 84-03 of July 4, 1984, to Institute the Investment Code of Cameroon, reprinted in INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES (ICSID), INVESTMENT LAWS OF THE WORLD: CAMEROON 17 (1985) [hereinafter Cameroon Investment Code]; see also Procedure for Granting Benefits of the Investment Code, Decree No. 84-1489 of November 21, 1984, reprinted in ICSID, INVESTMENT LAWS OF THE WORLD: CAMEROON 31 (1985) [hereinafter Cameroon Investment Decree].

³⁵ Code des Investissements [hereinafter Côte d'Ivoire Investment Code], Law No. 84-1230, Nov. 8, 1984, Journal Officiel de la République de Côte d'Ivoire (Nov. 15, 1984), reprinted in ICSID, INVESTMENT LAWS OF THE WORLD: IVORY COAST 5 (1985).

³⁶ See Foreign Investments Protection Act of 1963, as amended, reprinted in ICSID, INVESTMENT LAWS OF THE WORLD: KENYA 1 (1984) [hereinafter Kenya Investment Act].

³⁷ Zaire adopted a new investment code in April of 1986—Ordinance Law No. 86-028 of Apr. 5, 1986, Journal Officiel de la République du Zaire (Apr. 1986) at 7, reprinted in ICSID, INVESTMENT LAWS OF THE WORLD: ZAIRE 25 (1987) [hereinafter Zaire Investment

ing authority in one ministry, inter-ministerial rivalry for control over investment policy is avoided. In addition, all four countries have agencies specifically vested with authority for approving and guiding foreign investments corresponding with national development goals and objectives: Cameroon has the National Investment Commission;³⁸ Côte d'Ivoire, its External Finance and Credit Office of the Ministry of Economic Affairs and Finance (FINEX);³⁹ in Kenya this agency is called the Investment Promotion Centre (IPC);⁴⁰ in Zaire, it is the Investment Commission.⁴¹ These agencies can assist foreign investors in dealing with government bureaucracy.⁴² If and when these institutions function as designed,⁴³ they can help minimize the costs of securing permits and licenses, and obtain access to public services like electricity and water.⁴⁴ There are other advantages for placing in the hands of one agency the authority to examine, guide, and supervise foreign investments. First, negotiations are faster. Second, because the agency covers a wide range of negotiations, it is in a position to consider the overall impact of a project on the country, and it is able to weigh the total package of incentives and performance requirements to determine what is needed to attract a desired investor. Finally, a single agency is more likely to give

Code]. This Code replaced the old Code of 1979. The 1986 Code is reproduced in English translation in 2 ICSID REV.-FILJ 237 (1987). For an in-depth discussion of the new investment code, see Mitchell & Gittleman, *supra* note 10.

³⁸ See Cameroon Investment Decree, *supra* note 34, arts. 4, 11-21.

³⁹ FINEX approves all investments from outside the Franc Zone. See U.S. Dep't of State, 1990 INVESTMENT CLIMATE STATEMENT AND INVESTMENT DATA UPDATE for Côte d'Ivoire 6 (1988) [hereinafter INVESTMENT CLIMATE UPDATE]. Concerning the Franc Zone, see *infra* notes 139-145 and accompanying text.

⁴⁰ The IPC is under the Ministry of Finance. See BUSINESS INTERNATIONAL CORP., 1 INVESTING, LICENSING, AND TRADING CONDITIONS ABROAD: KENYA 15 (1990) [hereinafter ILT KENYA].

⁴¹ Zaire Investment Code, *supra* note 37, arts. 1(d), 35.

⁴² See Guisinger, *Comparative Country Policies*, *supra* note 32, at 32-33.

⁴³ Cumbersome and time consuming are the two most frequently heard complaints about investment approval procedures in most of Africa. With unusual candor, the Kenyan government made the following admission:

[I]nvestors do require as many as 30 specific approvals, for everything from the purchase of land to work permits for expatriates and the importation of capital goods. Many of these are necessary, but *the delays in obtaining them are not. The process of gaining Government approval for an investment can take as long as three years, itself a strong deterrent to investors.*

Sessional Paper No. 1 of 1986 On Economic Management For Renewed Growth § 6.28 at 99 (Kenya) (emphasis added) [hereinafter 1986 Sessional Paper]. The Government then decided to take steps to "simplify, coordinate and shorten the process of investor approvals." *Id.* The result was the Investment Promotion Center, but critics charge that this Center, which was intended to be used by investors for assistance with all necessary approvals, has barely been functioning. See ILT KENYA, *supra* note 40, at 15; see also Thurow, *Capital Flight Strains Kenyan Economy*, Wall St. J., Aug. 17, 1989, at A10, col. 1. This problem is not unique to Kenya. Ngongi, for example, cites the case of Cameroon where "it takes an average of 289 days for a foreign investor to go through all the formalities of setting up an undertaking." Ngongi, *Legal Aspects of Doing Business in Cameroon*, 1, 9 (forthcoming).

⁴⁴ Guisinger, *Comparative Country Policies*, *supra* note 32, at 33.

deference to precedent in its negotiations and decisions which provides a predictable pattern of results.⁴⁵

B. Entry Control

A private foreign entity contemplating investment in any of the four countries must first obtain approval from the state agency responsible for investments. In the case of Cameroon, recommendation for placement under one of the investment schedules is made by the National Investments Commission (NIC) or one of its subsidiary bodies.⁴⁶ The NIC is the sole authority which reviews applications to be treated under priority schedules. It may reject or approve an application according to the criteria specified in the Code. Côte d'Ivoire's External Finance and Credit Office of the Ministry of Economic Affairs and Finance (FINEX) is the agency charged under the Ivorian Investment Code with approving all investments from outside the franc zone, including capital contributions, capital allocations or loans, licensing, and technical assistance contracts. A foreign investor can bypass FINEX entirely and negotiate an ad hoc investment agreement with the Ivorian government,⁴⁷ but this procedure is reserved for priority enterprises.⁴⁸ In Kenya, a foreign national seeking to invest must obtain a certificate from the Ministry of Finance (the "Ministry").⁴⁹ The Ministry will issue a Certificate of Approved Enterprise when it is satisfied that the enterprise would further the economic development of, or would be of benefit to, Kenya.⁵⁰ Although foreign investors who have already invested foreign assets in Kenya are entitled to the grant of a certificate of approval, the certificate may be withheld by the Minister of Finance (the "Minister") if he is not satisfied with the benefit to Kenya from the investment.⁵¹ The Minister may "make regulations or give directions generally for the better carrying out of the purposes of this Act and prescribing the manner in which applications shall be made for certificates under this Act, and the information which shall accompany those applications."⁵² In Zaire the gatekeeper to foreign in-

⁴⁵ See Encarnation & Wells, *Evaluating Foreign Investment*, in *INVESTING IN DEVELOPMENT: NEW ROLES FOR PRIVATE CAPITAL?* 61, 73 (T. Moran ed. 1985).

⁴⁶ Cameroon Investment Code, *supra* note 34, art. 19.

⁴⁷ Côte d'Ivoire Investment Code, *supra* note 35, art. 22, provides that foreign enterprises that make investments of "exceptional" economic and social interest to the development of the country may negotiate an investment agreement with the government. Among other things, this agreement must stipulate the controls that the government may exercise on the enterprise. *Id.* art. 23. Those controls could include entry controls. These ad hoc agreements can also be negotiated by foreign enterprises making capital investments in Ivorian companies. *Id.* art. 25.

⁴⁸ *Id.* art. 11.

⁴⁹ Kenya Investment Act, *supra* note 36, § 3(1).

⁵⁰ *Id.* § 3(2).

⁵¹ *Id.* § 3(3).

⁵² *Id.* § 9.

vestment is the Executive Council, but only for certain types of investments. In practice, however, all foreign investments must receive approval from the President of the Republic.⁵³

Entry controls are dealt with indirectly in two of the countries:⁵⁴ through investment schedules in Cameroon,⁵⁵ and through preferential regimes in Zaire. Benefits for foreign investors under the Cameroon Investment Code are divided into four schedules: the special undertakings schedule (Schedule A);⁵⁶ the priority undertakings schedule (Schedule B);⁵⁷ the small- and medium-sized undertakings schedule (Schedule C);⁵⁸ and the schedule of undertakings governed by convention (Schedule D).⁵⁹ Approval under any one of these schedules is governed by technical criteria and by a procedure fixed by regulation.⁶⁰ Zaire's Investment Code, much like Cameroon's, establishes three preferential regimes: the General Regime, the Conventional Regime, and the Industrial Free Zone Regime.⁶¹ These regimes apply to both new investments and investments made by existing enterprises.⁶² Entry into any one of these preferential regimes requires a determination of the contribution of the investment to the country's economic and social development.⁶³ This contribution is appraised under the objectives prescribed by the Executive

⁵³ Zaire Investment Code, *supra* note 37, art. 37; Gittleman, *supra* note 10, at 277.

⁵⁴ In the Ivorian case, all private investments are freely allowed subject only to regulations for the protection of public health and social and economic order. Côte d'Ivoire Investment Code, *supra* note 35, art. 7. Furthermore, it is clear that the Ivory Coast Investment Code applies equally to Ivorian and foreign enterprises and persons. *Id.* arts. 1 & 5.

⁵⁵ See Cameroon Investment Code, *supra* note 34, arts. 22-35.

⁵⁶ The minimum qualification under this schedule is an investment during the term of the schedule of not less than 500 million francs CFA; location of the business in a border region or in an area where access and supply conditions are particularly difficult or engagement in an activity that yields a high value added; and a commitment to give preference to the use of adapted technologies, to utilize a large number of skilled local workers, and to guarantee the availability of continuing vocational training. See Ngongi, *supra* note 43, at 10.

⁵⁷ A minimum investment of 250 million francs CFA is required before a foreign business is approved under this schedule. In addition, the business must either be located in a non-port border area or contribute in "a considerable and long-lasting way to an improvement in the balance of payments in its sector or activity" or "have a very high value added." The business must also encourage subcontracting with other companies or give preferential treatment to technologies that employ a large number of skilled local labor with guarantees of their continued vocational training. *Id.* at 11.

⁵⁸ Sixty-five percent of the equity in a Schedule C business must be owned by Cameroonians. A business qualifying under this schedule must be willing to invest a minimum of 500 million francs CFA at prices on the date of the enactment of the Cameroon Investment Code. It must also guarantee continuing vocational training for its workers and its "job-creating expenses must be relatively low." *Id.*

⁵⁹ Schedule D enterprises are those which operate in areas of activity determined by the government to be of strategic importance in the implementation of the government's economic, social, and cultural development program. *Id.*

⁶⁰ *Id.* at 12-13; see also Cameroon Investment Code, *supra* note 34, art. 14(3).

⁶¹ Zaire Investment Code, *supra* note 37, art. 2.

⁶² *Id.* art. 3.

⁶³ *Id.* art. 2.

Council on the basis of general criteria of economic and financial profitability.⁶⁴ Article 4 provides that "[e]conomic profitability is appraised according to the advantages the investment offers to the overall Zairean economy," and lists specific factors that are considered,⁶⁵ including the magnitude of the investment, cost of the product, effect of the investment on the country's balance of payments and the social environment, number of jobs created, place of the investment, and the transfer of technology which will take place.⁶⁶ Requests for admission into any of these regimes must be submitted to the Department of Planning for onward transmission to the Investment Commission which prepares an official report, and together with a recommendation on the project, forwards it to the Commissioner for Planning. The latter then informs the Commissioner of Finance and the Executive Council (only for investments under the Conventional Regime) of the conclusions reached by the Investment Commission.⁶⁷

A foreign enterprise seeking to benefit⁶⁸ from the General Regime must meet three conditions. First, a minimum capital investment of ten million zaires⁶⁹ is required, subject to revision by Presidential Ordinance.⁷⁰ Second, if the promoters are all foreigners, at least eighty percent of the total investment must be financed by foreign sourced funds, thirty percent of which must be equity investment.⁷¹ Finally, total debt payable in five years or less cannot exceed thirty percent of the investment.⁷² Approval is granted under this regime by a joint decree issued by the Commissioners of Planning and Finance, and becomes effective upon approval by Presidential Ordinance.⁷³ Articles 22-25 provide special rules for admission for small- and medium-sized enterprises or industries which do not have to meet the ten million zaires minimum required of enterprises under the General Regime.⁷⁴

⁶⁴ *Id.* art. 4.

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.* arts. 35-37.

⁶⁸ See *infra* notes 197-199 and accompanying text.

⁶⁹ Zaire Investment Code, *supra* note 37, art. 7. As of March 1, 1987, the official rate of exchange was approximately 85 zaires to U.S. \$1. An investment of ten million zaires was worth approximately U.S. \$118,000. See Mitchell & Gittleman, *supra* note 10, at 129 n.37.

⁷⁰ Under the Zairian legislative process, Ordinance Laws (*les Ordonnances Lois*) are promulgated by the President of the Republic in his capacity as a legislator. CONSTITUTION DE LA RÉPUBLIQUE DU ZAIRE art. 43. However, Ordinance Laws may only be issued when the Legislative Council is not in session and in cases of emergency. *Id.* The President of the Republic, in his capacity as executive, may pass regulations called *Ordonnances* (Ordinances) implementing an Ordinance Law. *Id.* art. 45. See Gittleman, *supra* note 10, at 264.

⁷¹ Zaire Investment Code, *supra* note 37, art. 7.

⁷² *Id.*

⁷³ *Id.* art. 37.

⁷⁴ See *supra* note 69 and accompanying text.

To qualify for the Conventional Regime, the foreign investor must satisfy the conditions for admission to the General Regime and more. Article 28 provides that an enterprise which would otherwise qualify for the General Regime can opt for the more generous Conventional Regime if it is deemed of major interest to the economic and social development of the country and characterized by its exceptional magnitude—evaluated at 500 million zaires⁷⁵ or more—or by its long term viability.⁷⁶ If these two conditions are satisfied, the promoters may request that the Executive Council place their enterprise in the Conventional Regime.⁷⁷ Admission to the Conventional Regime is for a maximum period of ten years.⁷⁸

Industrial Free Zones have been established in both Zaire and Cameroon. Zaire's Industrial Free Zone Regime (*Zone Franche à Vocation Industrielle* or ZOFI) was established in 1981 to attract foreign investments to the free zone of Inga that would take advantage of the port facilities and relatively cheap electricity.⁷⁹ To date no foreign investors have taken the Zairian Government up on this offer.⁸⁰ Cameroon's Industrial Free Zone (CIFZ or the "Free Zone") was established in 1990 to promote new investments, facilitate export development, and create new jobs.⁸¹ Goods enter and leave the Free Zone duty-free,⁸² and in return, all goods produced in the Free Zone must be exported⁸³ and an enterprise must have, within five years from the date of commencement of operations, a work-force of which at least eighty percent are Cameroonians.⁸⁴ Under the Free Zone Regime, enterprises operating in CIFZ receive complete exemption from corporate income tax for ten years, a cap on corporate tax in subsequent years of fifteen percent,⁸⁵ tax-free and duty-free importation of machinery, raw materials, and supplies,⁸⁶ and exemption from import and export duties.⁸⁷

⁷⁵ Approximately U.S. \$5.9 million at a rate of exchange of 85 zaires to U.S. \$1. See Mitchell & Gittleman, *supra* note 11, at 134 n.56.

⁷⁶ Zaire Investment Code, *supra* note 37, art. 28.

⁷⁷ *Id.*

⁷⁸ *Id.* art. 29. Prior to the enactment of the 1986 Code, the duration of the Conventional Regime was unlimited. See Ordinance Law No. 81-010 of Apr. 2, 1981, reprinted in ICSID, INVESTMENT LAWS OF THE WORLD: ZAIRE 59 (1987); see also Gittleman, *supra* note 10, at 275 n.101.

⁷⁹ Ordinance Law No. 81-010 of Apr. 2, 1981, reprinted in ICSID, INVESTMENT LAWS OF THE WORLD: ZAIRE 59 (1987) (creating the ZOFI regime); Ordinance No. 81-066 of Apr. 30, 1981, reprinted in ICSID, INVESTMENT LAWS OF THE WORLD: ZAIRE 79 (1987) (creating the administrative framework for ZOFI).

⁸⁰ See Gittleman, *supra* note 10, at 276.

⁸¹ Ordinance No. 90/001 of Jan. 29, 1990, to Establish the Free Zone Regime in Cameroon [hereinafter Free Zone Regime].

⁸² *Id.* art. 18.

⁸³ *Id.* art. 26(a)(3).

⁸⁴ *Id.* art. 26(a)(2).

⁸⁵ *Id.* arts. 15, 16(a).

⁸⁶ *Id.* art. 18(b).

⁸⁷ *Id.* art. 18(c).

C. Monitoring of Business Operations

Under Cameroon's Investment Code, all approved foreign enterprises are subject to inspection and control by the Ministry in charge of industry⁸⁸ and by the customs authority.⁸⁹ The Ministry in charge of industry ensures that foreign enterprises granted benefits under the code comply with commitments made in the approval document or the establishment convention.⁹⁰ This document includes the enterprise's commitments to the State and other special obligations, the terms and conditions of the specific control to which the enterprise shall be subject, and the penalties provided for failure to meet these commitments.⁹¹ A foreign enterprise granted benefits under the Investment Code is required to forward to the Ministry in charge of industry its annual report of activities and its balance sheet and accounts three months following the end of its fiscal year. The balance sheet and accounts must be certified by a professionally qualified accountant licensed with the Central African Customs and Economic Union (UDEAC).⁹²

Approved foreign enterprises are also subject to inspections conducted during business hours by officials from the Ministry in charge of industry, who upon presentation of a warrant may ask to see documents relating to the enterprise's activity from all industrial undertakings, demand and receive copies of documents which they consider necessary for the accomplishment of their mission, and without the need for the presence of a judicial police officer, have free access to any place used for industrial and commercial purposes by the enterprise.⁹³ Any violation of the control and inspection provisions of the Investment Code is punishable either by a fine or complete withdrawal of approval.⁹⁴

Article 13 of the Ivorian Code contains the key provisions for monitoring foreign business operations. To qualify as a priority enterprise, the investor must submit an application supported by all relevant legal, technical, and economic documentation related to the project.⁹⁵ In addition, the application must contain the firm's commitment to comply with national or international quality standards applicable to the goods or services in question.⁹⁶ The firm must also comply with applicable legislative regulations and generally accepted

⁸⁸ Cameroon Investment Code, *supra* note 34, art. 6. The manner of exercise of this control is determined by regulations.

⁸⁹ *Id.* art. 18.

⁹⁰ *Id.* art. 20(1).

⁹¹ *Id.* arts. 16, 32.

⁹² *Id.* art. 37.

⁹³ *Id.* art. 41.

⁹⁴ *Id.* art. 43.

⁹⁵ Côte d'Ivoire Investment Code, *supra* note 35, art. 13.

⁹⁶ *Id.*

principles and procedures.⁹⁷ Furthermore, the firm must furnish the necessary information to monitor compliance with the agreed obligations.⁹⁸

Responsibility for ensuring the performance of the investment agreement rests with the Ministry of Industry.⁹⁹ Failure of an investor to perform according to the terms of the agreement may result in the forfeiture of the benefits, although a reasonable time for corrective action is allowed.¹⁰⁰ For projects of exceptional economic and social significance, an investment agreement must be negotiated with the government.¹⁰¹ Such an agreement must set forth the purpose, content, geographical location, and time of performance of the investment program.¹⁰² In addition, small- and medium-sized companies that wish to apply for benefits under the Code must present an investment program of an amount fixed by decree.¹⁰³ These companies are required to maintain an accounting system¹⁰⁴ and to comply with other requirements spelled out in Article 3.

Kenya's investment code provides that every certificate shall contain, among other things, the amount of the foreign assets invested or to be invested by the certificate holder as divided between capital, expressed in Kenyan currency, and any debt, expressed either in Kenyan currency or the relevant foreign currency.¹⁰⁵ The certificate must also contain "such other matters as may be necessary or desirable for the purposes of [the] Act."¹⁰⁶ All declared foreign assets must be invested in the approved enterprise within the approved period or the certificate shall be deemed to have been revoked.¹⁰⁷

The Zairian Code is somewhat vague with regard to the monitoring of foreign business operations, but Articles 39 through 41 set forth the duties of an enterprise admitted to one of the regimes of the Code. An admitted enterprise must, among other things, undertake to keep regular and thorough accounts in the form required by law, to submit to any supervision or inspection by an authorized administrative body, and to respond within the required time to all questionnaires and requests for statistical information.¹⁰⁸ While it is expected that all approved foreign investors will respect the laws of

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.* art. 15.

¹⁰⁰ *Id.*

¹⁰¹ *Id.* art. 22.

¹⁰² *Id.* art. 23.

¹⁰³ *Id.* art. 3.

¹⁰⁴ *Id.*

¹⁰⁵ Kenya Investment Act, *supra* note 36, art. 3(4)(a)-(c).

¹⁰⁶ *Id.* art. 3(4)(f).

¹⁰⁷ *Id.* art. 5.

¹⁰⁸ Zaire Investment Code, *supra* note 37, art. 39.

the host country, Article 39 particularly emphasizes respect of Zaire's exchange control laws.¹⁰⁹

An investor may substantially modify his investment program¹¹⁰ provided the investor informs the Commission that is authorized to examine enterprise proposals and, further, that it submits to the State Commissioners of Finance and Planning an approved revision of its obligations and incentives.¹¹¹ In this respect, Zaire's Code is the most flexible of the four countries. In the event the enterprise defaults on a commitment, the State Commissioner of Planning, after notifying the Investment Commission, will summon the enterprise to remedy the stated deficiencies.¹¹² If the summons is not acted upon, the approval will be withdrawn or notice of termination issued.¹¹³

D. Local Ownership Regulations

Typical local ownership requirements operate as a form of protection of domestic capital and as a tax on foreign-controlled businesses.¹¹⁴ The Investment Codes of Cameroon, Côte d'Ivoire, and Zaire impose no specific local ownership requirements. No requirement, for example, will be found in these codes for foreign and domestic equity interest to be split in any particular ratio, so a foreign corporate or individual investor is free to hold all of the equity interest in any of these countries. Zaire, however, requires an enterprise with all foreign promoters seeking to benefit from the General Regime to finance at least eighty percent of the total investment from foreign-sourced funds.¹¹⁵ Presumably this requirement will be re-

¹⁰⁹ This requirement represents a slight departure from the 1979 Investment Code, and two legal practitioners have questioned whether it is all that necessary given that all investors are expected, as a matter of course, to observe *all* the laws of Zaire not just those dealing with exchange controls. For this and other criticisms of the Zairian Code, see Mitchell & Gittleman, *supra* note 10, at 137.

¹¹⁰ Zaire Investment Code, *supra* note 37, art. 39.

¹¹¹ *Id.*

¹¹² *Id.* art. 42.

¹¹³ *Id.*

¹¹⁴ Such requirements (1) allow local investors to share in rents generated by foreign companies; (2) help to stimulate the development of the local capital markets; (3) in the process strengthen the local entrepreneurial sector; and (4) protect domestic capital while taxing foreign-owned enterprises. Lessard & Hansen, *supra* note 8, at § 3.1B, at 9-10. The requirement for shared ownership also has a downside to it as Lessard and Hansen point out in the following passage:

In those cases where the global financial and informational integration of the MNC (Multi-National Corporation) provide substantial advantages over independent units (i.e., reduced costs), other things being equal, shared ownership requirements will tend to constrain and discourage such international integration. Thus, this regulatory measure has the associated cost of discouraging those ventures involving extensive international integration and allowing the developing countries to specialize in a limited stage of production.

Id.

¹¹⁵ Zaire Investment Code, *supra* note 37, art. 7.

laxed if one of the promoters is a national of Zaire.

Kenya's Investment Code does not expressly restrict the share of any enterprise that can be owned by a foreign investor, though in practice a foreign investor's access to local financing is conditioned on the enterprise's percentage of local ownership.¹¹⁶ Recently announced government policy may make local participation an important consideration as a foreign investor decides whether or not to invest in that country.¹¹⁷ In 1986 the government of President Arap Moi introduced a series of policy changes to encourage the localization of ownership and control of industrial and commercial enterprises.¹¹⁸ Henceforth, foreign investors will be required to operate through a joint venture with a Kenyan partner who must have controlling interest, but it is unclear how and when the majority ownership ruling will be applied since clear guidelines have not been issued. According to press reports, the government has promised to accelerate the phase-out of the large expatriate workforce and to establish a task force to supervise the handing over of enterprises to African Kenyans.¹¹⁹ Whether a similar fate as befell Zaire's nationalization policy awaits Kenya's recently enacted indigenization policy is yet to be seen.¹²⁰

E. Sectors Open to FDI

A few developing countries allow foreign private participation in all sectors of the economy, but far more bar FDI in those sectors that

¹¹⁶ For firms engaged in manufacturing, agriculture, and tourism, local borrowing may not exceed the following percentages of share capital plus unimpaired reserves and foreign loans:

| <u>Equity Ownership</u> | <u>Local Borrowing Limit</u> |
|-------------------------------|------------------------------|
| Less than 40% Kenyan citizens | 20% |
| 40-50% Kenyan citizens | 40% |
| Over 50% Kenyan residents | 40% |
| Over 50% Kenyan citizens | 60% |
| Over 85% Kenyan residents | No restrictions |

See ILT KENYA, *supra* note 40, at 16.

¹¹⁷ For a brief analysis of these policy changes, see Rweyemamu, *Foreign Investment Policy: Kenya's Experience*, in DEVELOPING WITH FOREIGN INVESTMENT 260, 278-79 n.6 (V. Cable & B. Persaud eds. 1987).

¹¹⁸ Under earlier legislation passed in 1984, insurance companies must be one-third Kenyan-owned. See ILT KENYA, *supra* note 40, at 6.

¹¹⁹ *Id.*

¹²⁰ A government can pursue a policy of indigenization without actually wresting control of the economy from the clutches of foreign investors. That is, the transfer of legal ownership to host country nationals does not effectively terminate the control non-nationals have over their investments. For a trenchant analysis of this tension between local and international capital in the context of Nigeria's indigenization programs, see Biersteker, *Indigenization and the Nigerian Bourgeoisie: Dependent Development in an African Context*, in THE AFRICAN BOURGEOISIE: CAPITALIST DEVELOPMENT IN NIGERIA, KENYA, AND THE IVORY COAST 249 (P. Lubeck ed. 1987).

are considered politically sensitive (e.g., utilities, banking, insurance, media, oil exploration and exploitation) or are reserved for indigenous entrepreneurs (e.g., distribution of goods, retail trade, etc.).¹²¹ The relatively few entry restrictions imposed by the countries examined here, however, are not particularly burdensome. In Cameroon, for example, with the exception of the banking, insurance, and oil industries where there is a 33.3% local participation requirement,¹²² and public utilities which are generally reserved for state-owned companies, no sector of business activity is restricted to nationals.¹²³ This apparent solicitousness toward foreign investors is justified on the ground of economic necessity and the unavailability of local capital and technology:

[I]ncentives granted in the Investment Code . . . are directed at individuals and/or corporate bodies with, or with access to, substantial capital and modern technological facilities and know-how. . . . Since not many Cameroonians dispose of such facilities, there is no doubt that the government attaches great importance to the involvement of foreign investors in the economic development of this country.¹²⁴

The Ivorian government has reserved for itself utilities, public railroads, bus and airline transportation, local refining of petroleum,

¹²¹ See G. PFEFFERMAN, *PRIVATE BUSINESS IN DEVELOPING COUNTRIES* 28 (1988).

¹²² TOUCHE ROSS, *supra* note 11, at Cameroon-2.

¹²³ *Id.* Article 26 of the Cameroon Investment Code makes specific reference to local ownership. It provides that one of the requirements for an enterprise to benefit under Schedule C for small- and medium-sized undertakings is that at least 65% of the share capital be held by Cameroonians. Cameroon Investment Code, *supra* note 34, art. 26.

¹²⁴ Ngongko, *supra* note 43, at 10. In an effort to promote local entrepreneurship, the government has established a number of public institutions to provide credit and guidance to local enterprises. The Cameroon Development Bank or *Banque de Développement Camerounaise* (BCD) was created in 1960 to finance projects in line with economic and social development objectives. The National Investment Corporation or *Société Nationale d'Investissement* (SNI) was established in 1964 as a kind of merchant bank for financing and promoting joint ventures in partnership with the government. The National Centre for the Assistance of Small- and Medium-Size Undertakings or *Centre National d'Assistance aux Petites et Moyennes Entreprises* (CAPME) was created in 1970 to "provide artisanal enterprises with industrial and commercial character by coordinating the actions of business undertakings and to promote indigenous capital accumulation." Ndongko, *The Political Economy of Development in Cameroon: Relations Between the State, Indigenous Business, and Foreign Investors*, in *THE POLITICAL ECONOMY OF CAMEROON* 83, 105 (M. Schatzberg & W. Zartman eds. 1986) [hereinafter Ndongko, *Cameroon Political Economy*]. The National Fund for Rural Development or *Fonds National de Développement Rural* (FONADER) is a farmers' bank to provide credit to development projects located in rural areas. Ndongko makes the telling point that "[i]n spite of [these] . . . institutions and credit facilities, indigenous businessmen continued to have difficulties in obtaining loans." Ndongko, *Cameroon Political Economy*, *supra*, at 110. The failure of these institutions prompted the government to establish yet another agency, the Aid and Loan Guarantee Fund for Small- and Medium-Size Undertakings or *Fonds d'Aide et de Garantie des Crédits aux Petites et Moyennes Entreprises* (FOGAPE), authorized to direct aid to small indigenous businesses in the form of training, advice, and guaranteed bank loans. Both FONADER and FOGAPE have recently been replaced with two newly established banking institutions: the former is now the Agricultural Credit Bank and the successor to the latter is the Commercial Credit Bank. See New Year Address, *supra* note 6, at 1.

and cigarette production.¹²⁵ Articles 1 and 5 of the Ivorian Code state that guarantees and benefits provided under the regime apply to domestic as well as foreign persons or entities, but while not required by the Code, local Ivorian participation can be helpful in setting up and conducting business.¹²⁶ Article 25 indicates that investments by foreign firms in state-owned business enterprises may qualify for benefits under the Code.

Entry restrictions in Kenya are tied to the government's indigenization policy.¹²⁷ In keeping with this policy, the Kenyan government bars the entry of foreign investments in such activities as utilities and large-scale ownership of land for farming and ranching;¹²⁸ FDI entry into other sectors, such as insurance and trading,¹²⁹ is regulated by requiring some percentage of local ownership.

F. Remittability of Funds

Two kinds of regulations are included under this heading: (1) foreign exchange restrictions on the transfer of funds from the host capital-importing country to the capital-exporting country; and (2) restrictions on payments for foreign services, including royalties and fees for foreign technology, management services, and the like. The provisions relating to repatriation of capital and profits in the investment laws of the four countries reflect two approaches: one approach followed by Cameroon, Côte d'Ivoire, and Zaire places no restrictions in remittances of profits and capital except for the procedural requirement of permission for exchange—which is routinely granted. The second approach, followed by Kenya, requires certain conditions to be met before capital and profits can be repatriated.

1. Foreign Exchange Controls

Typically, exchange control problems are encountered when foreign investors want to convert local currencies into hard (i.e., freely exchangeable) currency, such as U.S. Dollars, Deutsche Marks, Pounds Sterling, or French Francs, in order to remit earnings or make other payments back to their home countries. The host gov-

¹²⁵ W. DIAMOND & D. DIAMOND, *supra* note 11, at Ivory Coast-16.

¹²⁶ See INVESTMENT CLIMATE UPDATE, *supra* note 39, at 6. This, however, applies only to non-priority enterprises.

¹²⁷ A similar policy of nationalization of all foreign businesses was pursued by the Zairian government in the early 1970s. Between 1973 and 1974 the government of Mobutu Sese Seko turned over to Zairian nationals or the state virtually all foreign-run commercial activities in the country. The following activities were restricted to Zairian nationals: import, export, transit, wholesale, retail, and services determined to be commercial by law. Faced with the imminent collapse of its commercial infrastructure, the government was forced to retreat from this hasty program of indigenization. These laws were subsequently rescinded in 1977. See Mitchell & Gittleman, *supra* note 10, at 128.

¹²⁸ See, e.g., ILT KENYA, *supra* note 39, at 6.

¹²⁹ *Id.*

ernment may prevent such transfer of funds through preferential exchange rates for particular kinds of transactions, outright prohibitions of payment of royalties, or simply bureaucratic delays.¹³⁰ Regardless of form, constraints on foreign exchange should be embraced with great caution. First, foreign investors view them with some alarm since, from their vantage point, these restrictions usually have a general impact on other restrictions and regulations. For example:

[R]ate of return regulation is most often applied through ceilings on allowed-profit remittances, local sourcing requirements are enforced by denying access to foreign exchange, etc. . . . [F]oreign exchange restrictions have a general impact since they affect all firms engaged in international trade. Further, although the effects of limits on investment and credit flows would appear to be specific to foreign firms . . . such restrictions will often have an even stronger effect on domestic firms.¹³¹

Government restriction of foreign investors' access to foreign exchange is usually in response to severe financing or debt repayment problems as well as a "substantial and continuing balance of payments deficit. . . . When a country faces such a balance of payments situation, it must allow its currency to devalue, draw upon its foreign exchange reserves, or adopt internal policy restraints on the economy."¹³² If the primary objective of enlisting FDI is to help the government solve its balance-of-payments difficulties,¹³³ then that government soon finds itself in simultaneous pursuit of two contradictory policies. An attractive investment climate is one where the foreign investor enjoys the freedom to remit profits and dividends and repatriate capital. Yet combatting a balance-of-payments crisis requires the establishment of temporary exchange restrictions and controls. The net effect of pursuing conflicting policy goals is the increased risk that foreign investors will simply move to more salubrious investment climes.¹³⁴ Of course, these conflicting objectives can be reconciled, as some have suggested, "through export projects in which the foreign investors are allowed to retain a portion of foreign-exchange earnings abroad."¹³⁵

¹³⁰ *Id.* at 11-12.

¹³¹ Lessard & Hansen, *supra* note 8, § 3.1B at 76-77.

¹³² T. BREWER, *supra* note 11, at 222; see also ORGANIZATION FOR ECONOMIC COOPERATION AND DEVELOPMENT (OECD), INTERNATIONAL INVESTMENT AND MULTINATIONAL ENTERPRISES 42 (1987).

¹³³ For instance, the Cameroon Government makes it quite clear that admission into the Priority Undertakings Schedule B will be based on whether the foreign investment is likely to "contribute in a considerable and long-lasting way to an improvement in the balance of payments in [its] sector of activity." Cameroon Investment Code, *supra* note 34, art. 24.

¹³⁴ Indeed Kenya's strict exchange controls may invite this effect. For a critique of these regulations, see Rweyemamu, *supra* note 117.

¹³⁵ See Cable & Persaud, *supra* note 2, at 13.

The investment codes of Cameroon,¹³⁶ Côte d'Ivoire,¹³⁷ and Zaïre¹³⁸ impose fewer restrictions on access to foreign exchange than does Kenya. Under the laws and regulations of these three countries foreign investors may transfer capital and profits. The membership of Cameroon and Côte d'Ivoire in the Franc Zone guarantees the availability of foreign exchange and unlimited convertibility of the CFA¹³⁹ franc with the French franc at a fixed rate,¹⁴⁰ providing considerable monetary stability and simplifying the problem of international payments by foreign investors.¹⁴¹ In both countries, prior authorization from the Ministry of Finance (Cameroon) or the Ministry of Economic Affairs and Finance (Côte d'Ivoire) is required for most transfers outside the Franc Zone.¹⁴² They also require investments from outside the Franc Zone to be declared.¹⁴³ Provided these requirements are met and the taxes on dividends have been paid, it is not difficult to move funds out of the country.¹⁴⁴

Kenya's exchange control policy, by way of contrast, makes it difficult for foreign investors to repatriate their profits. Although Kenya remains the most industrialized country in East Africa, its growth in the manufacturing sector has been curtailed because of restricted foreign exchange for raw material imports.¹⁴⁵ This foreign exchange shortage has drastically limited profit repatriation. Acquisitions and reinvestments, however, are not restricted.

Article 6 of the Kenya Investment Act provides that foreign in-

¹³⁶ Cameroon's exchange control regulations have been described as dated and not reflective of the economic and political realities of the country. Ngongi does not exactly say what these realities are and how the foreign exchange regulations have proved to be unresponsive. He does, of course, mention that proposals for reforming these regulations have been made and are pending. Ngongi, *supra* note 43, at 18.

¹³⁷ Article 9 of the Ivorian Code makes it clear that foreign businesses may repatriate to their country of origin the earnings and proceeds from liquidation of capital investments made in foreign currencies. Côte d'Ivoire Investment Code, *supra* note 35, art. 9.

¹³⁸ Zaïre's Investment Code guarantees foreign enterprises freedom of transfers associated with investment operations subject only to restrictions where necessary. Zaïre Investment Code, *supra* note 37, art. 31.

¹³⁹ CFA stands for *Communauté Financière Africaine* (African Financial Community).

¹⁴⁰ The Franc Zone groups together former French colonies in Africa whose currency, the CFA franc, is linked to the French franc. This link with France provides considerable stability to the CFA franc. For a detailed discussion on the structure of the Franc Zone, see, e.g., J. BOURDIN, *MONNAIE ET POLITIQUE MONÉTAIRE DANS LES PAYS AFRICAINS DE LA ZONE FRANC* (1982); P. GUILLAUMONT & S. GUILLAUMONT, *ZONE FRANC ET DÉVELOPPEMENT AFRICAIN* (1984); Kahler, *International Response to Economic Crisis: France and the Third World in the 1970s*, in *FRANCE IN A TROUBLED WORLD ECONOMY* 76 (S. Cohen & P. Gourevitch eds. 1982); P. ROBSON, *INTEGRATION, DEVELOPMENT AND EQUITY: ECONOMIC INTEGRATION IN WEST AFRICA* (1983); see also J. WILSON, *FRENCH BANKING STRUCTURE AND CREDIT POLICY* 103-33 (1957).

¹⁴¹ See, e.g., Ngongi, *supra* note 43, at 18.

¹⁴² See U.S. DEP'T OF COMMERCE, *FOREIGN ECONOMIC TRENDS AND THEIR IMPLICATIONS FOR THE UNITED STATES, IVORY COAST* 9 (1988).

¹⁴³ See INVESTMENT CLIMATE UPDATE, *supra* note 39, at 6, 8.

¹⁴⁴ *Id.*

¹⁴⁵ See INVESTMENT CLIMATE, *supra* note 1, at 177.

vestors must comply with the requirements of the Exchange Control Act.¹⁴⁶ It further provides that the enterprise has repatriation rights in the approved foreign currency and at the prevailing official rates of exchange with respect to: (1) after-tax profits arising from or out of its investment of foreign assets, including retained profits which have not been capitalized; (2) the capital, i.e., the original book value of the investment specified in the certificate as representing the original equity investment of the holder of the certificate plus any retained earnings which have not been capitalized; and (3) the principal and interest of any loan specified in the certificate.¹⁴⁷ Under Kenya law all subsequent investments after the initial participation, as well as for reinvested earnings, must be submitted for a new certificate and for permission to repatriate future capital and earnings.¹⁴⁸ Foreign investors have generally objected to this provision.¹⁴⁹

A foreign enterprise seeking to exercise these repatriation rights must obtain exchange control approval. For holders of Certificates of Approved Enterprises, approval to transfer profits and dividends is automatic,¹⁵⁰ but foreign companies willing to reinvest some of their earnings in the country are likely to receive more favorable treatment than those investors who do not.¹⁵¹

2. *Restrictions on Payments for Technical Services*

In addition to restricting access to foreign exchange, host governments can also restrict the kinds of earnings that a foreign investor can repatriate. Such restrictions serve to give preferential treatment to local suppliers of technology and other services, and to prevent the use of transfer-pricing mechanisms¹⁵² for payment of services within the multinational firm.¹⁵³

¹⁴⁶ Kenya Investment Act, *supra* note 36, art. 6.

¹⁴⁷ *Id.* art. 7.

¹⁴⁸ See W. DIAMOND & D. DIAMOND, *supra* note 11, at Kenya-12 to -13.

¹⁴⁹ *Id.* The Ministry of Finance has lobbied unsuccessfully to have it relaxed.

¹⁵⁰ See ILT KENYA, *supra* note 40, at 12.

¹⁵¹ *Id.*

¹⁵² Transfer pricing has been defined as the "practice whereby the MNE [multinational enterprise], in its intraenterprise transactions, can sometimes effectively modify the tax base on which its entities are assessed, or possibly avoid exchange controls, by 'doing business' within the MNE corporate structure itself, so as to reallocate costs and revenues in such a way that its profits are realized where the tax and exchange environment is most favorable." C. WALLACE, *LEGAL CONTROL OF THE MULTINATIONAL ENTERPRISE* 127 (1982); see also Note, *Regulation of Transfer Pricing in Multinational Corporations: An International Perspective*, 10 N.Y.U.J. INT'L L. & POL. 67 (1977).

¹⁵³ See, e.g., Lessard & Hansen, *supra* note 8, § 3.1B at 10. Restrictions on payments for services rendered by foreign investors carry some potential unintended side effects. Lessard and Hansen have identified two such drawbacks: (1) they "can place both the local firm and MNC [multinational corporation] subsidiaries at a disadvantage in world markets relative to firms based elsewhere because comparable local services are often not available at reasonable costs;" and (2) "these restrictions tend to favor the MNC over the local firm

Foreign investors in Cameroon may transfer to their countries of residence, in the currency in which they made the investment, dividends and proceeds of all kinds realized from invested capital, from the winding up of their properties, or from the sale of assets.¹⁵⁴ The Ivorian Code also imposes no restrictions on capital repatriation. Article 9 is clear that foreign businesses may repatriate the earnings and proceeds from liquidation of capital investments made in foreign currencies to their country of origin.¹⁵⁵

As in Cameroon and Côte d'Ivoire, foreign enterprises in Zaire are guaranteed the right to transfer: (1) dividends and income generated by dividends reinvested in Zaire; (2) royalties, principal, interest, and related charges to be paid by a Zairian enterprise; and (3) any expropriation indemnity due to a foreigner.¹⁵⁶ Kenya requires prior exchange control approval before royalties and management fees can be remitted abroad. This approval must be secured annually and the foreign investor is also required to submit an application to the Kenyan Central Bank for each payment. The approval process is idiosyncratic and subject to the vagaries of Kenya's foreign exchange position.¹⁵⁷

F. Performance Requirements

Two significant findings come out of recent empirical studies on the determinants of foreign investment in both the developing and developed countries. First, performance requirements together with investment disincentives weigh into a firm's investment decision. Second, foreign investors give greater consideration to these requirements than to incentives offered by the host-government.¹⁵⁸ Performance requirements are either explicit or implicit, and they operate as a quid pro quo for the foreign investor's right of access to

since the MNC is more able to evade restrictions on payment for foreign services than is a local firm which must acquire them locally or on an arms-length basis." *Id.*

¹⁵⁴ Cameroon Investment Code, *supra* note 34, art. 9.

¹⁵⁵ Côte d'Ivoire Investment Code, *supra* note 35, art. 9.

¹⁵⁶ Zaire Investment Code, *supra* note 37, arts. 32-34.

¹⁵⁷ See ILT KENYA, *supra* note 40, at 12.

¹⁵⁸ See, e.g., Mason, *The International Food Processing Industry*, in INVESTMENT INCENTIVES AND PERFORMANCE REQUIREMENTS 56, 83 (S. Guisinger ed. 1985). This study of eight major food processing industries found that foreign investors believe that performance requirements reduce efficiency and, hence, profitability. *Id.* at 87. It bears noting that several such studies have been conducted; in addition to Mason's on the food manufacturing industry, see Hood & Young, *The Automobile Industry*, in INVESTMENT INCENTIVES AND PERFORMANCE REQUIREMENTS 96 (S. Guisinger ed. 1985); Miller, *Computers*, in INVESTMENT INCENTIVES AND PERFORMANCE REQUIREMENTS 168 (S. Guisinger ed. 1985); Gray & Walter, *The Petrochemical Industry*, in INVESTMENT INCENTIVES AND PERFORMANCE REQUIREMENTS 237 (S. Guisinger ed. 1985). In all, more than 30 firms were interviewed, from which more than 70 investment decisions spread over 20 host countries were selected. See Guisinger, *supra* note 32, at ix. For the proposition that foreign investors attach less importance to heavy incentive schemes, see ORGANIZATION FOR ECONOMIC COOPERATION AND DEVELOPMENT, INTERNATIONAL INVESTMENT AND MULTINATIONAL ENTERPRISES 4 (1987).

the host country market. These requirements include trade-related requirements (where either a minimum value of exports must be maintained or the investor must include a minimum amount of domestic content in its product), and workforce indigenization and job creation requirements (where the foreign investor is required to meet certain specified employment levels). The focus here is on local content and trade-related performance requirements since these tend to affect both domestic and international trade patterns.¹⁵⁹

1. *Local Content Requirement*

In Cameroon and Zaire, eligibility for some benefits under the investment regime is related to the local content of the finished product. Articles 23, 25, 27, and 30 of the Cameroon Investment Code provide that Schedule A, B, C, and D undertakings will receive a reduced rate of five percent for import duties and taxes, and exemption from duties and taxes levied on local purchases of: (1) equipment, materials, machines, and tools directly necessary for the manufacturing and processing of products; (2) parts or spare parts clearly recognizable as belonging to the aforementioned equipment; (3) raw materials or products wholly or partially used to make the finished or manufactured products; and (4) disposable raw materials or products intended for packaging or wrapping the finished manufactured product.¹⁶⁰

The Zaire Investment Code also uses local content as an inducement and not as a disincentive. Article 11 grants total exemption from duties and taxes on imports if the required goods cannot be manufactured in Zaire, or the before-price tax of the same goods produced locally is more than ten percent higher than the delivered price of the identical imported product.¹⁶¹ In addition, an approved enterprise may benefit indirectly from lower prices on capital goods and industrial inputs produced in Zaire by an enterprise that is exempted from all indirect taxes and para-fiscal taxes associated with the production of these goods.¹⁶² The Department of National Economy and Industry annually compiles a list of capital goods and industrial inputs produced in Zaire which is distributed to investors by the Investment Commission.¹⁶³ This is clearly an effective way to link local businesses with foreign investors in a mutually beneficial arrangement.

¹⁵⁹ See Guisinger, *supra* note 32, at 54.

¹⁶⁰ Cameroon Investment Code, *supra* note 34, arts. 23, 25, 27 & 30.

¹⁶¹ Zaire Investment Code, *supra* note 37, art. 11. These restrictions have been criticized for being too inflexible such that they are likely "to give rise to situations that would render an otherwise attractive investment nonviable." Mitchell & Gittleman, *supra* note 10, at 131.

¹⁶² Zaire Investment Code, *supra* note 37, art. 12.

¹⁶³ *Id.* art. 13.

In contrast to the Zaire and Cameroon Codes where the benefits of using local products are clear, Côte d'Ivoire's Code requires a commitment from priority enterprises to utilize local raw materials, products, and services as long as they are competitive as to quality, price, and availability with equivalent goods of foreign origin.¹⁶⁴ The Code does not stipulate any local content percentages.

Kenya does not impose a minimum local content requirement, except for vehicle assembly,¹⁶⁵ although ad hoc specifications on local content are sometimes written into investment agreements negotiated between foreign investors and the government.¹⁶⁶ Indeed, many foreign investors now recognize that it is good business strategy to include local content in their proposals to win "points with the government and [its inclusion] is also useful in working with the price-control system . . . [making it] . . . also easier to obtain export licenses for raw materials or intermediate goods than for finished products."¹⁶⁷

The Kenya Investment Code also imposes specific performance-type requirements in the manufacturing under bond program, a program which encourages manufacturing for world-wide exports.¹⁶⁸ To qualify for this program a firm (foreign or domestic) must export all of its output.¹⁶⁹ Benefits include exemption from export taxes and levies, customs duties, and sales taxes on plant, machinery and equipment, raw materials, components, and any other imported raw materials.

2. *Export Requirements*

None of the countries impose a requirement for export performance, but Article 12 of the Cameroon Investment Code exempts from export duties industrial products intended for export irrespective of the Schedule.¹⁷⁰ Depending on the circumstances, however, export duties may be imposed on a given product on the recommendation of the government services concerned.¹⁷¹ Under the Zairian Code "[a]pproved projects intending to export all or part of their processed or semi-processed production under conditions favorable to the country's balance of payments situation are exempted from

¹⁶⁴ Côte d'Ivoire Investment Code, *supra* note 35, art. 13.

¹⁶⁵ See INVESTMENT PROMOTION CENTRE, 2 INVESTOR'S GUIDE TO KENYA 3 (1989).

¹⁶⁶ See ILT KENYA, *supra* note 40, at 7. The current industry rate to which most foreign enterprises adhere is 30% though the automobile-assembly sector has been able to negotiate a 20% local content requirement in their investment agreements. The government, on the other hand, would like to raise this floor to about 40%. *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ *Id.* at 3, 6.

¹⁷⁰ Cameroon Investment Code, *supra* note 34, art. 12(1).

¹⁷¹ *Id.* art. 12(2).

export duties and taxes."¹⁷²

3. Import Restrictions

Import controls traditionally regulate foreign exchange expenditures and protect local industry. These twin purposes are very much evident in the import controls imposed by the countries under study. In Kenya, Cameroon, and Zaire, import duties are relaxed and special rates and exemptions granted for foreign enterprises using local raw materials and products.¹⁷³

The Ivorian Investment Code grants customs duty exemptions to materials and equipment needed for the investment,¹⁷⁴ provided that materials and equipment of equivalent price and quality are not manufactured in Côte d'Ivoire or are not available.¹⁷⁵ Replacement parts for such equipment are exempted from ten percent to thirty percent of the value of the equipment, depending on the geographic location of the investment.¹⁷⁶ Vehicles used to transport people, merchandise, or personal effects are not exempted from customs duties.¹⁷⁷

In Kenya, import restrictions are directly tied to exchange controls. First, all imports require a license from the Ministry of Commerce.¹⁷⁸ Licenses will not be granted for importation of goods available locally—such as private automobiles and textiles¹⁷⁹—or goods that are not essential to the country's manufacturing industry or the general well-being of its population.¹⁸⁰ Since import restrictions and foreign exchange controls are inextricably interwoven,¹⁸¹ an importer who obtains an import license must also obtain a permit from the Central Bank of Kenya assuring a foreign exchange allocation.¹⁸² Imported goods with an invoice value of Ksh 40,000¹⁸³ may be required to undergo a quality and quantity inspection by the central superintendent.¹⁸⁴

¹⁷² Zaire Investment Code, *supra* note 37, art. 16.

¹⁷³ See *supra* notes 154-164 and accompanying text.

¹⁷⁴ Côte d'Ivoire Investment Code, *supra* note 35, art. 17.

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

¹⁷⁸ See *ILT KENYA*, *supra* note 40, at 20.

¹⁷⁹ The government has banned the importation of personal motor vehicles and textiles—the latter in a 1984 ministerial ruling—in a move clearly designed to protect local industry. See *ILT KENYA*, *supra* note 40, at 21.

¹⁸⁰ *Id.*

¹⁸¹ The imposition of import controls has been prompted by the need to conserve foreign currency. *Id.* at 14.

¹⁸² See *INVESTMENT PROMOTION CENTRE, 2 INVESTOR'S GUIDE TO KENYA* 22-3 (1989).

¹⁸³ The 1989 exchange rate was Ksh 1 for U.S. \$0.06.

¹⁸⁴ *INVESTMENT PROMOTION CENTRE, 2 INVESTOR'S GUIDE TO KENYA* 23 (1989).

G. Fiscal Incentives

Fiscal incentives are widely used by host developing countries to attract private foreign investment even though their effectiveness is open to question.¹⁸⁵ Following Shah and Toye,¹⁸⁶ fiscal incentive schemes are grouped under four headings. Group 1 includes tax holidays (total or partial exemption of foreign businesses from direct taxation for a specified period), loss carry-overs, and exemption of royalties, dividends, and interest from taxes. Group 2 fiscal incentives include accelerated depreciation allowances allowing the write-down of a foreign company's asset for tax purposes faster than would be possible under normal accounting depreciation rules, and tax credits, investment allowances, and development rebates. Included in Group 3 fiscal incentives are import duty exemptions, in the form of either a waiver of duties, or a rebate of duty paid on imported raw materials and capital goods. Investment grants comprise the final group of fiscal incentives. Group 1 incentives are the most widely used in all four countries, followed in frequency by Group 2 incentives; investment grants are rarely employed.

1. Group One Incentives

a. Tax Holidays and Carry-Over Provisions

The Ivorian Investment Code contains the most generous tax holidays of the four codes. At the other extreme is Kenya's Income Tax Act of 1973 which imposes a forty-five percent corporate tax¹⁸⁷ on all Kenyan registered and incorporated companies, both local and foreign.¹⁸⁸ Between these two extremes lie Cameroon and Zaire.

Foreign businesses in Côte d'Ivoire that qualify as priority enterprises¹⁸⁹ are exempt from the prevailing corporate tax for five to

¹⁸⁵ For a critique of fiscal incentive schemes, see Hadari, *The Role of Tax Incentives in Attracting Foreign Investments in Selected Developing Countries and the Desirable Policy*, 24 INT'L LAW. 121 (1990); S. SURREY & P. MCDANIEL, *TAX EXPENDITURE* (1985); Yelapaala, *The Efficacy of Tax Incentives Within The Framework of the Neoclassical Theory of Foreign Direct Investment: A Legislative Policy Analysis*, 19 TEX. INT'L L.J. 365 (1984); Shah & Toye, *Fiscal Incentives for Firms in Some Developing Countries*, in *TAXATION AND ECONOMIC DEVELOPMENT* 269 (J. Toye ed. 1978); Surrey, *Tax Incentives as a Device for Implementing Government Policy: A Comparison with Direct Government Expenditures*, 83 HARV. L. REV. 705 (1970).

¹⁸⁶ Shah & Toye, *supra* note 185, at 271-72.

¹⁸⁷ Mining companies that are engaged in mining specified minerals pay a corporate tax of 27.5% for the first five years and 45% thereafter. The corporate tax for resident insurance companies is at the rate of 40% on income from life insurance business. TOUCHE ROSS, *supra* note 11, at Kenya-31.

¹⁸⁸ See INVESTMENT PROMOTION CENTRE, 2 INVESTOR'S GUIDE TO KENYA 25 (1989).

¹⁸⁹ The following categories of enterprises are eligible for priority status: (1) real estate; (2) industrial crops and related processing industries, including oilseeds, rubber, and sugar cane; (3) industrial preparation or processing by mechanical or chemical means of such local vegetable and animal products as coffee, cocoa, cotton, and timber; (4) manufacturing and assembling goods and articles for large scale consumption, including textiles, building materials, fertilizers, and pharmaceuticals; (5) extractive industries, such as mining, enriching or processing of minerals and related handling and transport industries,

twenty-five years. The Ivorian Code also allows a further period of three years after the tax holiday during which losses incurred in the tax holiday period can be used to offset future, otherwise taxable, profits.¹⁹⁰ Companies involved in the exploration and exploitation of oil deposits may carry forward losses indefinitely.¹⁹¹ In addition, losses arising from depreciation can be carried forward without limitation.¹⁹²

Under Cameroon's General Tax Code, foreign enterprises are exempt from corporate taxes¹⁹³ for two years;¹⁹⁴ thereafter the minimum corporate tax¹⁹⁵ must be paid even if losses are incurred unless a specific exemption is granted. Much as in Côte d'Ivoire, losses can be carried forward three years, but there is no carry-back provision, and losses may not be transferred from one entity to another in the event of a corporate reorganization.¹⁹⁶

Kenya, alone among the Four Darlings, rejects the use of tax holidays to attract foreign investments. The government's position is that

[i]nvestors with projects that contribute to Kenya's development goals should be able to earn attractive profits without any special tax incentives. Thus tax holidays, special depreciation rules, customs duty and sales tax remissions, and other special tax treatment will generally not be used to promote investment.¹⁹⁷

Kenya has found these tax incentives to be costly to the government and of uncertain benefit in attracting foreign investment. With respect to loss carry-forward provisions, however, Kenya provides its foreign investors with a relatively more generous package than the other three countries, as an eligible company may carry forward its business losses against future profits of the business indefinitely.¹⁹⁸ To qualify for this tax break, the company's losses must come from any one of three "specified sources," i.e., rental, agriculture and similar activities, or employment.¹⁹⁹ Furthermore, a loss may be offset only against current and subsequent profits derived from the same

and oil prospecting; (6) power production; and (7) tourism (covered by special Law 73/368 of July 1973). W. DIAMOND & D. DIAMOND, *supra* note 11, at Ivory Coast-2.

¹⁹⁰ See COOPERS & LYBRAND, *supra* note 11, at I-86.

¹⁹¹ *Id.*

¹⁹² *Id.*

¹⁹³ This provision applies only if the business is sustaining losses. TOUCHE ROSS, *supra* note 11, at Cameroon-5.

¹⁹⁴ The duration of this holiday is eight years for small- and medium-size firms. Cameroon Investment Code, *supra* note 34, art. 27. Investments that are located outside areas with a high industrial concentration may have the duration of the tax holiday extended to 15 years. *Id.* art. 28.

¹⁹⁵ The effective rate is 38.5% (a corporate tax levied at a flat rate of 35% plus a local surcharge of 10% of the company tax). TOUCHE ROSS, *supra* note 11, at Cameroon-19.

¹⁹⁶ *Id.*

¹⁹⁷ 1986 Sessional Paper, *supra* note 43, § 6.23 at 98.

¹⁹⁸ TOUCHE ROSS, *supra* note 11, at Kenya-30.

¹⁹⁹ *Id.*

category of income.²⁰⁰

Fiscal incentives under the Zaire scheme are conditioned by the preferential regime under which the investment was admitted.²⁰¹ Approved investments under the General Regime are exempt from the tax on stated capital or any subsequent increase in capital for a maximum period of five years.²⁰² Under the Conventional Regime, where investors negotiate with the Investment Commission for broader concessions, which once granted are valid for a maximum of ten years, approved investments can be exempt from the tax on stated capital for at least ten years.²⁰³ Losses can be carried forward under the Zaire scheme to offset the taxable income of the two succeeding years, but no carry-back is permitted.²⁰⁴

b. Tax Treatment of Dividends, Royalties, Interest, and Profits

In a marked departure from a trend observed in many developing countries in which tax holidays are usually accompanied by exemptions on dividends,²⁰⁵ none of the four countries exempts distributed dividends or, for that matter, royalties from tax liability unless a tax treaty applies.²⁰⁶ In Cameroon, royalties and interest paid to undertakings within the UDEAC²⁰⁷ states are deductible if reasonable. Interest on capital borrowed for business purposes is

²⁰⁰ *Id.* Losses from other sources, if they occur, are not deductible from any other income arising in the same year.

²⁰¹ The Code establishes three preferential regimes: the General Regime, the Conventional Regime, and the Industrial Free Zone Regime. Zaire Investment Code, *supra* note 37, art. 2; see also *supra* notes 58-74 and accompanying text.

²⁰² Zaire Investment Code, *supra* note 37, art. 9. This provision has raised some interpretational problems since it is not clear whether it applies to all or certain forms of business organizations. The position of the Investment Commission is that only a joint stock company, i.e., *Société par Actions à Responsabilité Limitée* (SARL), can take advantage of the Article 9 exemption. Mitchell & Gittleman, on the other hand, contend that the Commission's interpretation of the provision is not supported by the text of the statute and that it applies to an SARL as well as a limited liability company, *Société Privée à Responsabilité Limitée* (SPRL). Mitchell & Gittleman, *supra* note 10, at 129-30. For a discussion of the various forms of business organizations in Zaire, see Gittleman, *supra* note 10, at 264-69.

²⁰³ Zaire Investment Code, *supra* note 37, art. 29.

²⁰⁴ See COOPERS & LYBRAND, *supra* note 11, at Z-6.

²⁰⁵ Previous studies on fiscal incentives found that countries that offered tax holidays almost always exempt dividends and royalties from withholding taxes. See, e.g., Shah & Toye, *supra* note 185, at 279; Ahmad, *Incentive Taxation for Economic and Social Development*, 11 PAKISTAN ECON. & SOC. REV. 154 (1973).

²⁰⁶ Côte d'Ivoire has entered into tax agreements for the relief from double taxation on income arising in Côte d'Ivoire with France, Belgium, Germany, Norway, Canada, the United Kingdom, and those African countries that are members of the OCAM Agreement. See COOPERS & LYBRAND, *supra* note 11, at I-80. Kenya has double taxation treaties with Canada, Denmark, Germany, Norway, Sweden, the United Kingdom, and Zambia. *Id.* at K-5.

²⁰⁷ UDEAC stands for *L'Union Douanière et Economique de l'Afrique Central*. It was created by a treaty entered into on December 8, 1964, between Cameroon, Congo-Brazzaville, Gabon, and the Central African Republic. Equatorial Guinea was admitted as a member on December 18, 1982.

deductible, but interest on loans by shareholders that exceed their equity holding is deductible only up to a limit of two percent above the lending rate of the Central Bank at the time the interest payments were calculated.²⁰⁸ In addition, interest on loans to a public or private limited liability company by shareholders who are attorneys or officers of the company is deductible only to the extent that such loans do not exceed, for all the shareholders, fifty percent of the paid-in capital of the company.²⁰⁹

Dividends distributed to shareholders of foreign companies operating in Côte d'Ivoire are subject to a twelve percent withholding tax.²¹⁰ Royalties and technical or administrative assistance fees paid to non-residents are subject to a twenty-five percent withholding tax on eighty percent of the foreign company's total income.²¹¹ To prevent double taxation, the Code allows for the deduction of some operational costs, such as: (1) the net land income derived from the realty assets of a company; (2) "the net income of capital and stock shown on the assets of the enterprise and previously taxed on the income of transferable securities after expenses" and from ten to thirty percent "of charges fixed by contract depending on the investment participation or indebtedness in the balance sheet subject to a limitation of fifty percent of the firm's capital;"²¹² (3) provisions for equipment and tool renewal; and (4) provisions for the restoration of deposits.²¹³

Dividends distributed to shareholders by a Kenyan company (foreign- or local-owned) are subject to a fifteen percent withholding tax, deducted at source, if the recipient resident company controls less than 12.5% of the voting stock of the distributing company, and if the dividend is part of the investment income of the life fund of a resident insurance company.²¹⁴ The Kenya Income Tax Act does not provide any special rules regarding the deductibility of royalties,²¹⁵ but in practice a deduction for royalties paid to non-residents will be allowed if withholding tax has been applied.²¹⁶ Interest expenses are also deductible, but only if the debt was wholly and exclusively contracted to produce taxable income. Interest on debt incurred to finance loans to directors is not deductible.²¹⁷

²⁰⁸ TOUCHE ROSS, *supra* note 11, at Cameroon-17.

²⁰⁹ *Id.*

²¹⁰ See COOPERS & LYBRAND, *supra* note 11, at I-82 to -83.

²¹¹ *Id.*

²¹² W. DIAMOND & D. DIAMOND, *supra* note 11, at Ivory Coast-20.

²¹³ *Id.*

²¹⁴ See COOPERS & LYBRAND, *supra* note 11, at K-6.

²¹⁵ According to one knowledgeable source, interest, in theory, "is not deductible until any necessary withholding tax is accounted for. However, by concession, this requirement is normally waived provided evidence of payment after the end of the relevant accounting period can be produced." TOUCHE ROSS, *supra* note 12, at Kenya-28.

²¹⁶ *Id.*

²¹⁷ *Id.*

The Zairian scheme targets tax exemptions according to the preferential regime under which the investment has been admitted. For instance, approved investments under the General Regime and in the Special Regime for Small and Medium Enterprises and Industries are exempt from the tax on profits²¹⁸ for two to five years depending on the location of the investments.²¹⁹ Dividends paid to holders of new shares issued by approved companies are also exempted from the tax on revenues derived from capital assets.²²⁰ The Zaire code also divides investments into new and existing investments, each receiving a different mix of tax exemptions. Under Article 18 of the investment code, for example, new approved enterprises are totally exempted from the tax on profits.²²¹ Existing enterprises are granted a tax credit which is deducted from the taxes on profits due during the five fiscal years following the date of their approval.²²² The tax credit can never exceed thirty percent of the total amount of the approved investment.²²³

2. *Group Two Incentives*

a. *Accelerated Depreciation Allowances*

All four countries operate accelerated depreciation and other tax credit schemes for the benefit of foreign investors. Cameroon permits most foreign establishments with a turnover of 200 million francs CFA to revalue their fixed assets, and then to accelerate the depreciation of the revalued fixed assets. This is a one-time allowance and applies to enterprises in existence prior to 1985.²²⁴ In Kenya, wear and tear allowances are granted in lieu of depreciation on a company's assets, usually machinery.²²⁵ The depreciation rates vary depending on the class of machinery,²²⁶ and the allowance can be claimed for the whole year in the year of purchase of the asset. It is noted that

[i]n any subsequent year, a whole year's allowance can be claimed even though the asset may not have been used for some months during that year. In the year of disposal, no allowance can be claimed;

²¹⁸ Zaire Investment Code, *supra* note 37, art. 18.

²¹⁹ *Id.* Investments located in Economic Zone A enjoy the exemption from the tax on profits for a duration of five years and those in Economic Zone B enjoy the same benefits but for only 2 years.

²²⁰ *Id.* art. 9.

²²¹ Zaire Investment Code, *supra* note 37, art. 18.

²²² *Id.* art. 19.

²²³ *Id.* Articles 20 and 21 set forth the bases upon which the tax credit is computed.

²²⁴ TOUCHE ROSS, *supra* note 11, at Cameroon-5.

²²⁵ This is not defined but in practice includes vehicles, ships, equipment, tools, furniture, fixtures, and fittings.

²²⁶ For instance, class I machinery, i.e., heavy self-propelling machines such as tractors, combine harvesters, earth-moving equipment, and so on, are allowed a wear-and-tear allowance of 37.5%; class II machinery, 25%; and class III machinery 12.5%. TOUCHE ROSS, *supra* note 11, at Kenya-25.

the proceeds of disposal reduce the balance on which future wear and tear allowance can be claimed.²²⁷

In Côte d'Ivoire, accelerated depreciation, allowed at double the normal rate, can be extended on a straight line basis to new equipment and machinery used exclusively by the foreign enterprise for industrial operations with a normal life of over five years.²²⁸ Foreign employers are also allowed forty percent accelerated depreciation on the cost of construction for housing employees. To qualify for this allowance "certain health and safety standards [must be] met and . . . the annual depreciation over the normal life of the buildings is reduced."²²⁹

In Zaire, investments by small and medium enterprises admitted to the General Regime are authorized to calculate depreciation according to an accelerated rate such that three quarters of the value of equipment is amortized after half of its life expectancy.²³⁰ Given the absence of standard rates of depreciation in the tax law, in practice the annual rates generally accepted by the authorities range from a low of 2.5% for buildings to a high of 25% for automobiles.²³¹

b. Investment Allowances

Kenya grants incentives in the form of investment allowances for geographical location of the investment.²³² The scheme is designed to spur industrial growth in the rural areas and to encourage the diversification of development projects.²³³ Consistent with this objective, investments outside Nairobi and Mombasa are eligible for a one-time deduction equal to fifty percent of the cost of plant, machinery, buildings, and equipment, thus reducing income taxes in the early years of a project.²³⁴ This contrasts with the twenty percent rate for new investments located in Nairobi and Mombasa.²³⁵ The

²²⁷ *Id.*

²²⁸ See W. DIAMOND & D. DIAMOND, *supra* note 11, at Ivory Coast-20 to -21.

²²⁹ *Id.* at Ivory Coast-21.

²³⁰ Zaire Investment Code, *supra* note 37, art. 24.

²³¹ See COOPERS & LYBRAND, *supra* note 11, at Z-5. Plant, equipment, furniture, fixtures, and fittings can be depreciated at the rate of 10-15%. *Id.*

²³² See 1986 Sessional Paper, *supra* note 43, § 6.24, at 98.

²³³ INVESTMENT PROMOTION CENTRE, 2 INVESTOR'S GUIDE TO KENYA 7 (1989). It would appear that the policy of using locational incentives to induce foreign investments in non-urban areas is prompted by Kenya's demographic realities. Kenya is projected to have a population of 35 million people by the end of the century, 78% more than lived in Kenya in 1984; the work force will more than double from 6.5 million to 14 million and between 9 to 10 million inhabitants will be added to the urban population. To accommodate this rising population and to stem the flow of migration from rural to urban areas, a policy of creating jobs in the secondary towns and smaller urban centers becomes an imperative: "Unless new workers can be attracted in large numbers to jobs in the smaller urban centres and on prosperous farms, it will be necessary to build at least six cities the size of present-day Nairobi, or watch Mombasa and Nairobi expand into cities of two to four million each." 1986 Sessional Paper, *supra* note 43, § 1.1, at 1.

²³⁴ *Id.* § 6.24, at 98.

²³⁵ *Id.*

government estimates that under typical circumstances these allowances, discounted over the life of the investments, are the equivalent of a ten percent subsidy of the initial cost of the investment.²³⁶ For manufacturers under bond, there is an investment allowance of 100 percent regardless of the location.

In Zaire, investments by existing enterprises are allowed an investment tax credit that is deducted from the taxes on profits earned by the enterprise during the five fiscal years from the date of decree approving the investment.²³⁷

3. Group Three Incentives

a. Import Duty Exemptions

Cameroon law exempts from import duties all specially approved industrial enterprises on the Schedule of Internal Tax on Production. These enterprises are required to pay a tax at the rate determined by the instrument placing them under the schedule.²³⁸ In addition to import duty concessions, goods produced by the specially-approved enterprises are exempted from the internal tax on production, and enjoy a reduced rate of export duty for an indefinite period. To qualify for this special treatment²³⁹ the enterprise must be engaged in an industry sector which contributes to Cameroon's economic development, have a high level of investment, and have a job creation program.²⁴⁰

The Customs Code also provides for the temporary importation under bond of specialized equipment needed for a particular project. The import duty is waived if the equipment is reexported within a specified period.²⁴¹ Under the Tourism Code, certain categories of businesses that are involved in the hotel and tourist trade are granted reduced import duty.²⁴²

Kenya exempts imported plant and machinery from customs duty and other import taxation up to a maximum CIF value of Ksh 10 million, if the equipment is intended for small-scale industries established outside of major cities.²⁴³ Special concessions are reserved for industries located more than twenty kilometers outside the boundaries of Nairobi and Mombasa but within a ten kilometer radius of towns with a population of more than 20,000 inhabitants, as well as for industries located in towns with a population of less than

²³⁶ *Id.*

²³⁷ Zaire Investment Code, *supra* note 37, art. 19.

²³⁸ TOUCHE ROSS, *supra* note 11, at Cameroon-4.

²³⁹ Application to be placed on this schedule may be made to the President of the Republic through the Minister of Finance. *Id.*

²⁴⁰ *Id.*

²⁴¹ *Id.*

²⁴² *Id.* at 5.

²⁴³ INVESTMENT PROMOTION CENTRE, 2 INVESTOR'S GUIDE TO KENYA 6-7 (1989).

20,000.²⁴⁴ The former industries enjoy a fifty percent remission of duties and tax; the latter are accorded a complete duty exemption.²⁴⁵

In Zaire, approved investments under the General Regime are exempt from import duties on the machines, plant, and equipment required for the project provided the equipment is new, and local industry is unable to supply it at the same quality and price.²⁴⁶ Small and medium enterprises or industries admitted to the General Regime enjoy total exemption from import duties and taxes (excluding the administrative tax) for machines, tools, initial spare parts, industrial inputs, and materials necessary for implementing the investment.²⁴⁷ In addition, enterprises may deduct expenses incurred training the manager of the enterprise or its personnel.²⁴⁸

H. Guarantees Against Expropriation

Investor confidence in the host country remains perhaps the most important determinant in the investment decision. One way to inspire such confidence is for the host country to provide the foreign investor guarantees against expropriation of foreign-owned businesses. Such guarantees can take the form of constitutional provisions or by incorporation into the investment code. Whether these guarantees are sufficient to allay investors' fears of expropriation is yet to be determined. Investors will want to know that, in the event of nationalization, investors will be compensated and, if so, by what standard. The debate over appropriate standards for compensation following an involuntary taking of foreign-owned property is not new, and it is one that finds the Third World and the industrialized states on opposite sides of the question.²⁴⁹ The latter, under United States leadership, take the position that "prompt, adequate, and effective compensation" is the only just and reasonable standard of compensation for the expropriation of alien property.²⁵⁰ For this group of states, this standard represents positive international law

²⁴⁴ *Id.*

²⁴⁵ *Id.*

²⁴⁶ Zaire Investment Code, *supra* note 37, art. 11. This exemption "is also limited to goods that cannot be manufactured in Zaire or to those cases where local goods are at least ten percent more expensive in Zaire than the identical delivered product manufactured outside of Zaire." Mitchell & Gittleman, *supra* note 10, at 131.

²⁴⁷ Zaire Investment Code, *supra* note 37, arts. 23, 27(1), 31(1).

²⁴⁸ *Id.* art. 24.

²⁴⁹ For a review of the contending positions, see Lillich, *The Valuation of Nationalized Property in International Law: Toward a Consensus or More "Rich Chaos"?*, in 3 THE VALUATION OF NATIONALIZED PROPERTY IN INTERNATIONAL LAW 183 (R. Lillich ed. 1975); Fatouros, *International Law and the Third World*, 50 VA. L. REV. 783 (1964).

²⁵⁰ This is the so-called "Hull Formula" named after the U.S. Secretary of State, Cordell Hull, who first articulated the standard in response to the Mexican government's expropriation of American-owned companies operating in that country. The 1938 expropriation provoked a voluminous exchange of diplomatic notes between Secretary Hull and his Mexican counterpart, Foreign Minister Eduardo Hall. See generally Vandeveld, *The Bilateral Investment Treaty Program of the United States*, 21 CORNELL INT'L L.J. 201, 231 & n.200.

on expropriation compensation.²⁵¹

The Third World states uniformly reject this Western-sponsored interpretation of international law in favor of one which removes the issue of compensation from the province of international law.²⁵² Proceeding from a position first taken by Mexico, the developing states advocate the principle of "national treatment" or the "equality of treatment" standard.²⁵³ It holds that states are bound to treat the property of aliens in substantially the same manner in which they treat the property of their own nationals.²⁵⁴ If aliens are not to be accorded more favorable treatment than nationals, it follows that all questions relating to the issue of compensation ought to be settled in accordance with the laws of the expropriating state. Anything short of this would treat aliens as a privileged group, according to them privileges denied nationals.

The doctrine of equality of treatment is reflected in the constitution and investment code of two of the countries surveyed here. The constitution of Cameroon provides that "[n]o one shall be deprived [of their property] save for public purposes and subject to the payment of compensation to be determined by the law."²⁵⁵ Under the Ivorian Investment Code, foreign investors are guaranteed treatment identical to that given to nationals.²⁵⁶ In contrast, the guarantees against expropriation found in the Kenyan and Zairian codes are much closer to the Western standard, and are more comprehensive than the guarantees contained in the investment regimes of Cameroon and Côte d'Ivoire and several other African countries.²⁵⁷ Kenya's constitution guarantees that "[n]o property of any description shall be compulsorily taken possession of,"²⁵⁸ and in its investment code the Kenyan government again guarantees compensation

²⁵¹ There has been some erosion in this position even within the United States and voices have been raised in certain quarters, particularly from the American Law Institute, questioning the continuing viability of the Hull formula. For an exposition of this viewpoint, see Schachter, *Editorial Comment, Compensation for Expropriations*, 78 AM. J. INT'L L. 121 (1984).

²⁵² For the Third World position on the question of compensation in cases of expropriation of alien property, see, e.g., Fatouros, *supra* note 249, at 807-11. See also Roy, *Is the Law of Responsibility of States for Injuries to Aliens a Part of Universal International Law?*, 55 AM. J. INT'L L. 863 (1961).

²⁵³ Fatouros, *supra* note 249, at 807-08.

²⁵⁴ *Id.*

²⁵⁵ See CONSTITUTION OF THE REPUBLIC OF CAMEROON, Preamble. But see Treaty Concerning the Reciprocal Encouragement and Protection of Investment, Feb. 26, 1986, United States-Cameroon, art. III, reprinted in ICSID, 3 INVESTMENT LAWS OF THE WORLD: INVESTMENT TREATIES ("[E]xpropriations or nationalizations give right to prompt, adequate and effective compensation.").

²⁵⁶ Côte d'Ivoire Investment Code, *supra* note 35, art. 8.

²⁵⁷ Cf., e.g., Encouragement of Investment Act of Apr. 26, 1980 (Sudan), art. 19(a)(i) (providing only for "just compensation"); Investment Code (Ghana), P.N.D.C. Law 116 of July 13, 1985, art. 19, Official Gazette (July 17, 1985) (providing a guarantee against expropriation).

²⁵⁸ KENYA CONSTITUTION § 75.

for any foreign business that is the subject of compulsory acquisition by the state. Article 8 provides that the measure for compensation shall be "full and prompt payment of compensation."²⁵⁹ Zaire's code provides for "just and fair compensation" in the event of expropriation.²⁶⁰

One way to test the efficacy of these guarantees is in the context of an aggressive policy of indigenization requiring foreign investors to divest their investments in favor of locals. Fortunately for foreign investors, in Cameroon and Côte d'Ivoire there are no articulated government policies favoring the transfer of foreign businesses to nationals.²⁶¹ The same, however, is not true for Kenya, but given Kenya's spotless record on nationalization²⁶² and its relatively comprehensive guarantees against expropriation, foreign investors have little cause to worry. Zaire, on the other hand, flirted briefly with an indigenization policy which divested foreign investors of their ownership interests in their Zairian operations, but retreated when the Zairianization policy proved to be a monumental disaster.²⁶³ It is most unlikely that the government would want to repeat this experience anytime soon.

III. Conclusion

The four African countries were selected for this comparative analysis because they appear to share so many characteristics, but appearances can be deceiving. The analysis shows that while similarities are widespread at the macro-level, differences are discernible at the micro-level. Although the Four Darlings are arguably similar on a number of important dimensions, they are not exactly fungible.

The evidence suggests some caution is appropriate when discussing the political stability factor so as not to overstate its significance. While it is true that all four countries have been politically stable for a considerable stretch of time, Kenya and Zaire have experienced some fundamental changes in their investment regimes during this same period. These changes could have been just as destabilizing as, say, frequent labor unrests, threats of coup d'état, and so on, the kind of events that are immediately associated with political instability in Africa. The foreign investor should be able to separate political stability from instability in terms of the risks a particular combination of circumstances poses to one's investment. This risk, as Dr. Akinsanya dutifully reminds, "results largely from changes of

²⁵⁹ Kenya Investment Act, *supra* note 36, art. 8; *see also* KENYA CONSTITUTION § 75.

²⁶⁰ Zaire Investment Code, *supra* note 37, art. 5.

²⁶¹ The Ivorian government has since the early 1980s pursued a policy of selective privatization of state-run enterprises. INVESTMENT CLIMATE UPDATE, *supra* note 39, at 9.

²⁶² No foreign companies have been nationalized in Kenya in the past 15 years. *See* ILT KENYA, *supra* note 40, at 5.

²⁶³ *See supra* note 127.

government (public) policy which may or may not be related to or caused by domestic political disorder."²⁶⁴ If Akinsanya is correct, then Kenya and Zaire's outwardly stable political systems may belie the far-reaching internal investment policy changes that have taken place. From the perspective of a foreign investor, these changes increase the risks of investing in those countries.

The comparative analysis of investment laws and regulations points to important policy differences with respect to how the four governments have approached the matter of creating a hospitable investment environment. Kenya, for instance, has one of the most restrictive exchange regulations governing imports and the repatriation of capital among the four countries in this survey, and is alone in rejecting tax holidays as a device to attract foreign investment. Kenya believes instead that a sound, dynamic economy backed by stable political conditions are all that is needed to attract foreign investors. True to its image of a state organized around a presidential monarch, Zaire requires presidential approval for admission of foreign investments to its several preferential investment regimes, notwithstanding provisions in the investment code delegating this authority to other state organs. Uncharacteristically for countries blithely dismissed as the *chasses gardées* of West European (viz., French) business interests, Cameroon and Côte d'Ivoire embrace the more defiant Third World compensation standard. Zaire and Kenya, on the other hand, are much closer to the West on this issue. Despite these differences, the Four Darlings are among the African countries which can credibly boast of having attractive investment climates.²⁶⁵ If one were to place their respective investment regimes on a continuum of liberalness, Cameroon's and Côte d'Ivoire's would be the most liberal, Kenya's the least, while Zaire's lies somewhere in between.

²⁶⁴ A. AKINSANYA, *MULTINATIONALS IN A CHANGING ENVIRONMENT: A STUDY OF BUSINESS-GOVERNMENT RELATIONS IN THE THIRD WORLD* 252 (1984).

²⁶⁵ Those who have previously examined the investment codes of these four countries have found them to be quite liberal. See, e.g., Ngongi, *supra* note 43; Sams, *The Legal Aspects of Doing Business in Cameroon*, 17 INT'L LAW. 489 (1983); Woods, *supra* note 18; Rweyemamu, *supra* note 117; Gittleman & Mitchell, *supra* note 10.

